COMBATING CIVILIAN CASUALTIES: RULES AND BALANCING IN THE DEVELOPING LAW OF WAR

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This Article addresses why we need to reconsider the roles of rules, explicit balancing, and focusing on consequences of key international law provisions in light of recent developments in war. In conducting this reconsideration, this Article weighs the possible tradeoffs between enhancing the progressive content of the law of war and enhancing compliance with that law. This reconsideration will also be impacted by differences in motives for fighting and a group's responsiveness to relevant international law. This Article concludes that some circumstances, particularly in the context of the intentional killing of civilians, require flat, fixed rules, while others require more sensitive, explicit balancing tests.

I. INTRODUCTION

Of late, it has seemed that the law of war is due for reassessment.[1] A number of developments have placed unaccustomed strain on familiar principles of the law of war. Some important elements of just such a reconsideration of the law of war are considered here. This Article tries to account for some of these developments insofar as they affect the important subject of noncombatants in the law of war.

Much has recently been changing in the practice of war. We have seen the rise of non-governmental fighting forces that do not

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1. Though it must be said that such reappraisals can be appropriate at any reasonable interval. *See, e.g.*, J. Bryan Hehir, *Just War Theory in a Post-Cold War World*, 20 J. RELIGIOUS ETHICS 237, 238 (1992) (discussing the danger in "understating how completely we need to rethink war, politics, and ethics today"); D. Thomas O'Connor, *A Reappraisal of the Just-War Tradition*, 84 ETHICS 167, 168 (1974).

meet some of the standard indicators of even guerrilla combat forces.[2] Differences in traditional military capabilities of opposing forces have in some recent cases been dramatic.[3] As well, religious dimensions of warfare have ascended into prominence.[4] The very ideas of success in war, of the goals of deterrence versus retribution, of the probability of success in war, of the boundaries between war and other forms of conflict, and of the termination of war have recently come under renewed scrutiny.[5]

Our attention will be focused primarily on the process of the fighting of war itself, and in particular on the combatant/non-combatant distinction. We notice first in this context a new and increasing capacity for the controlled and discriminate use of some contemporary weapons systems.[6] Often, such weapons are used with some degree of self-imposed risk to the user, for the sake of reducing unintended civilian casualties.[7] But even the best

2. See, for example, the discussion in Aryeh Neier, *The Military Tribunals on Trial*, N.Y. REV. BOOKS, Feb. 14, 2002, at 11, 11 (discussing the issues of the wearing of uniforms, open display of arms, and general respect for the customs and laws of war).

3. *See, e.g.*, Edward Cody, *When 'Martyrs' Are Not Yet Men: Palestinians Fear Rise of Youth Suicide Culture After Troops Kill 3 Boys*, WASH. POST, May 10, 2002, at A1 (attack by three fifteen-year-old Palestinian boys "with a crude pipe bomb and some knives" on Israeli soldiers guarding an Israeli settlement). More generally, see a number of the responses in Michael Marien et al., *The New Age of Terrorism: Futurists Respond*, FUTURIST, Jan.-Feb. 2002, at 16.

4. *See, e.g.*, Patricia A. Long, *In the Name of God: Religious Terrorism in the Millennium: An Analysis of Holy Terror, Government Resources, and the Cooperative Efforts of a Nation to Restrain its Global Impact*, 24 SUFFOLK TRANSNAT'L L. REV. 51 (2000); Marien et al., *supra* note 3, at 16.

5. *See, e.g.*, Sir Michael Howard, *It's Not so Much War It's More Like a Hunt*, TIMES (London), Oct. 2, 2001, *available at* 2001 WL 4934414 ("'[T]he war against terrorism' cannot be won, for terrorism will always be available as a weapon in the hands of people desperate and ruthless enough to use it."); *Is This Just War?*, U.S. CATH., Dec. 2001, at 12, 14 (In an interview with Lisa Sowle Cahill and Father Michael Baxter, Cahill remarked, "there has to be reasonable 'hope of success,' and that's very doubtful in this case as well."). For a sense of historical continuity of the concept of war, see George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1514-15 (2002) ("War always requires coordinated action, a chain of command, a sense of organization and, above all, a consciousness on the part of the individuals engaged in military action that they are acting as part of the collective effort.").

6. *See, e.g.*, Thomas E. Ricks, *Bull's-Eye War: Pinpoint Bombing Shifts Role of GI Joe*, WASH. POST, Dec. 2, 2001, at A1.

7. See, for example, the discussion of the NATO decision not to bomb the Serbian so-called "Rock-n-Roll" bridge, to limit civilian casualties, including the lives of Serbian volunteers who stood upon the bridge calculatedly in Randy W. Stone, Comment, *Protecting Civilians During Operation Allied Force: The*

technology, coupled with some self-restraint on the part of the attacker, certainly does not ensure the safety of noncombatants.[8]

At the same time, we also see some fighting forces intentionally killing legally protected noncombatants, at the predictable price of the attackers' own deaths.[9] Even some of what are often casually assumed to be neutral and benign, or even universally beneficial, conventions of war fighting have been intentionally violated.[10] Other such conventions have been manipulated, in ways that endanger even the manipulating group's own noncombatants, for the sake of military advantage, or out of perceived necessity.[11]

These developments have occurred against a historical background in which noncombatants generally have been bearing an increasing share of overall casualties and of the harshest burdens of war.[12] Taken together, these developments should prompt our best thinking about the international legal control of war. This Article will address these recent developments in the context of what we might call the logic of the law of war. In particular, we shall, in light of the developments referred to above, broadly reconsider the

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Enduring Importance of the Proportional Response and NATO's Use of Armed Force in Kosovo, 50 CATH. U. L. REV. 501, 529-30 (2001). For further reference to the tactical use and moral status of more or less innocent shields, see Larry Alexander, *A Unified Excuse of Preemptive Self-Protection*, 74 NOTRE DAME L. REV. 1475, 1482-83 (1999); Justice De Bunker, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1899, 1902-09 (1999). *See also infra* notes 34-35 and accompanying text. For the use of unnecessarily indiscriminate advanced technology, see generally Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law*, 22 MICH. J. INT'L L. 85 (2000).

8. *See, e.g.*, Nicholas D. Kristof, Editorial, *A Merciful War*, N.Y. TIMES, Feb. 1, 2002, at A25 ("My best guess is that we killed 8,000 to 12,000 Taliban fighters, along with about 1,000 Afghan civilians."). This Article will use "noncombatant" and "civilian" as synonyms, without seeking thereby to bypass any genuine moral complications.

9. *See, e.g.*, *supra* note 3 and accompanying text.

10. The intentional targeting of those customarily conceived as civilians may make sense to a force that seeks to re-designate who counts as a civilian, or that believes its own civilians to be already in some serious sort of jeopardy, or that attacks on civilians will raise one's profile or damage enemy morale. *See infra* notes 15-16, 171 and accompanying text.

11. See, for example, the practice of calculatedly stationing either friendly or hostile civilians near military targets in order to discourage attacks, as discussed *supra* note 7 and *infra* notes 34-35.

12. *See* Harry Dunphy, *Civilians Make Up More War Casualties*, ASSOCIATED PRESS ONLINE, May 2, 2002, *available at* 2002 WL 20248016 ("War increasingly targets civilians and puts mothers and children at greater risk of dying or losing their homes . . . ."); *Women and Children Bear Brunt of War*, SAIGON TIMES DAILY, May 3, 2002, *available at* 2002 WL 3335988 (citing an increase from five percent noncombatant war casualties to sixty-five percent to ninety percent over the course of the twentieth century).

roles of rules, of explicit balancing, and of focusing on consequences in key provisions of the international law of war.[13]

In the course of this reconsideration, we must bear in mind possible tradeoffs between enhancing the progressive content of the law of war and enhancing compliance with that law.[14] We shall conclude that differences in motives for fighting,[15] and particularly in a group's responsiveness[16] to relevant international law,[17] complicate our judgments of the best ways to interpret the law of war.[18] If we recognize the value of uniform applicability of the law as well as that of contextual sensitivity in the law,[19] some difficult tradeoffs will be required.[20] Crucially, we shall see that some circumstances call for a choice between adopting flat, fixed rules, as opposed to adopting more sensitive, explicit balancing tests in interpreting key provisions of the law of war.[21] We may gain educational value and progressivity for the law at a manageable cost if we apply balancing tests in some cases. This will be especially true in cases directly affecting groups that are, at least for the moment, thought to be especially sensitive to considerations of international law.[22] But there may, on the other hand, be advantages in applying flat rules in the case of other sorts of groups, and in literally all cases of the intentional targeting of civilians.[23]

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13. *See infra* Parts III-VI.

14. "Compliance" as used here is meant to include considerations of the realistic enforceability of the law, beyond voluntary compliance.

15. Compliance with particular international legal norms, no less than with regard to domestic legal norms, presumably may vary depending upon motives such as pure calculative gains in wealth, protection of established economic relationships, religious fanaticism, or the desire for a homeland. *See infra* note 171 and accompanying text.

16. We shall assume that some cultures can even be defined in part by considerations including, for example, presumed religious fanaticism, or desire for a homeland, or for trade. *See generally* BENJAMIN R. BARBER, JIHAD VS. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD (1996).

17. *See infra* notes 25-34 and accompanying text.

18. *See infra* Part V.

19. Even if it were otherwise optimal to do so, there would be costs and difficulties in interpreting some crucial rules of war as involving balancing tests for some groups and flat rules for others. Rules can be drafted at least so as to provide for facial uniformity while retaining proper sensitivity to national differences through reference to relevant circumstances, capacities of the parties, reasonable capacity, and so forth. This is not to suggest that international and domestic legislation cannot or should not distinguish among entities based on size, population, and so forth where relevant.

20. *See infra* notes 87-95 and accompanying text.

21. *See infra* Parts III-VI.

22. Depending in part on the considerations referred to *supra* note 15, not all groups may be considered equally sensitive, at any given time, to any particular court of world opinion or even to possible rules of actual courts. *See infra* note 170 and accompanying text.

23. *See infra* Parts V-VI.

We shall see that even the groups thought to be most amenable to international law should adhere to flat, absolute rules, rather than attempt direct interest balancing in the special context of the intentional killing of civilians.[24]

II. SOME CRUCIAL PROVISIONS OF THE LAW OF WAR REGARDING NONCOMBATANTS

Among the most widely discussed elements of the contemporary international law of war is Protocol I to the Geneva Conventions of 1949.[25] For the sake of convenience and clarity, let us merely list here a few of the key provisions of Protocol I. Specifically, we will focus on Article 51,[26] Article 57,[27] and Article 58.[28]

Paragraph 4 of Article 51 prohibits "indiscriminate attacks."[29] Very roughly, indiscriminate attacks include those not aimed at a specific military target, those using weapons that cannot be aimed solely at the military target, and those using weapons the effects of which cannot be confined to the military target.[30] But the scope of prohibited indiscriminate attacks also includes broader failures of discrimination. For example, prohibited indiscriminate attacks also

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24. *See infra* Part VI.

25. *See* Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Conventions, June 8, 1977, 16 I.L.M. 1391 (entered into force Dec. 7, 1978) [hereinafter Protocol I]. Some of the most directly relevant materials are conveniently collected in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS (Dietrich Schindler & Jirí Toman eds., 3d ed. 1988). Internet access to the relevant provisions is available at http://www.unhchr.ch/html.intlinst.htm (last visited Feb. 6, 2003). Substantive war crimes provisions generally comparable to those discussed below are contained in the Elements of Crimes sections of Addendum Part II to the Report of the Preparatory Commission for the International Criminal Court, which went into effect July 1, 2002, without the United States' ratification. *See, e.g.*, *United Nations, Report of the Prepatory Commission for the International Criminal Court*, U.N. Doc. PCNICC/2000/1/Add.2, art. 8(2)(b)(iv), *available at* http://www.un.org/law/icc (last modified Dec. 3, 2002) (referring to the proportionality requirement, by that term, at explanatory note 36, and providing some further attempted clarification, while narrowing the proscription in some respects).

26. Protocol I, *supra* note 25, art. 51.

27. *Id.* art. 57.

28. *Id.* art. 58. For a discussion of the official United States position regarding the status of Protocol I, see generally Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987).

29. Protocol I, *supra* note 25, art. 51(4).

30. *Id.*

include those which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof which would be excessive in relation to the concrete and direct military advantages anticipated.[31]

This provision establishes that unintended and even subjectively unforeseen and sincerely regretted civilian deaths may be prohibited.[32] Not all unintended civilian harms are prohibited, though. Only those unintended civilian deaths and other harms are barred that are either unnecessary or somehow override or outweigh "the concrete and direct military advantage anticipated"[33] from the attack, however, the idea of an "attack" is understood.

Paragraph 7 of Article 51 recognizes the incentives created by the above provisions, and prohibits using civilians as human shields for the purpose of protecting legitimate military targets from attack.[34] The manipulative use by a defender of civilians as human shields at an otherwise legitimate military target does not, however, relieve the attacker of its obligations toward civilian noncombatants.[35]

Developing some of these general themes, Article 57 requires an attacker to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."[36]

Further, a prospective attacker must "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[37]

Finally, and closely related, Article 57 adds that:

> [A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to

31. *Id.* art. 51(5)(b).

32. *See id.*

33. *Id.* Query, though, whether "concrete and direct" requires immediacy in either time or space. This is further complicated by characterizing an attack as merely part of a broader (simultaneous) attack.

34. *Id.* art. 51(7); *see also id.* art. 58(b) (providing that parties "shall, to the maximum extent feasible . . . avoid locating military objectives within or near densely populated areas").

35. See the discussion in W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 160-68 (1990).

36. Protocol I, *supra* note 25, art. 57(2)(a)(ii).

37. *Id.* art. 57(2)(a)(iii).

> civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[38]

There is much that might be said about these provisions generally, and about problems and possibilities in their interpretation. Interestingly, some of the provisions above seem, at least initially, to lend themselves most obviously to interpretation as calling for some sort of weighing and balancing process. But there also seems, on the other hand, to be a flat rule that would simply prohibit an attack intentionally directed solely at civilians, even for purposes such as intimidation or reducing civilian morale.[39]

In the latter such case, we say that the provision takes the form of a flat rule rather than a balancing test because the language chosen seems calculated to discourage balancing of harms and benefits in any explicit way, at least at the level of the rule itself. That is, the latter rule seems to preclude a claim that the intentional killing of civilians might be balanced somehow against resulting benefits such as winning a future battle, or even shortening or de-escalating a war. These sorts of possible justifications for intentional direct attacks against civilians seem to be ruled out, whatever moral weight one might wish to grant them. Such an interpretation of the latter provision seems at least plausible.

Some of the other provisions cited above, however, do seem more literally accommodating of some sort of guided weighing and balancing process.[40] On such an interpretation, for example, we could conclude that some unintended civilian casualties violate the laws of war, but that others do not, depending in part on the value[41] of the "concrete and direct[42] military advantage"[43] thought[44] to be

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38. *Id.* art. 57(2)(b).

39. *See supra* notes 29-31 and accompanying text. In addition, Article 48 specifies that attackers "shall direct their operations only against military objectives." Protocol I, *supra* note 25, art. 48; *see also id.* art. 51(2) ("The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."). Classically, see 3 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE, ch. 11, § 9-10 (A.C. Campbell trans. 1901); Francisco de Vitoria, *On the Law of War*, *in* POLITICAL WRITINGS: FRANCISCO DE VITORIA 293, 314-15 (Anthony Pagden & Jeremy Lawrance eds., Cambridge Univ. Press 1991) (1539).

40. *See supra* notes 31, 36-38 and accompanying text.

41. Contemporaneous assessments of military "value" by interested parties would seem, for various reasons, often readily contestable.

42. The focus on "concrete and direct" military value appears to be an attempt to limit the sheer speculativeness, open-endedness, and subjectivity of this inquiry. Why "indirect" but certain consequences should be ignored is

obtainable thereby.[45]

Some type of weighing and balancing process thus seems invited by these and similar provisions. It would thus be natural to interpret such provisions as balancing-oriented rather than rule-oriented. Actually, though, it is possible to argue for a rule-oriented approach to even these provisions. There are grounds for taking the above references to "excessiveness"[46] to invoke the ideas of proportionality and proportionalism.[47] And there is actually room for debate, we shall see,[48] as to whether proportionalism is in turn best interpreted as a balancing-oriented idea or as a rule-oriented idea.

The first task, though, is to convey some idea of the fiendish difficulties of interpretation, reasonable application, and legal enforcement of the above provisions addressing incidental injuries to noncombatants, specifically when they are interpreted to invite weighing and balancing. For this purpose we will draw not only upon the provisions' facial difficulties, but as well on a few of the quandaries raised by recent American military efforts in Afghanistan.[49] Some of the limitations of balancing tests in the law of war can be recognized through mere reflection, but others present themselves most vividly only in the complexity of lived experience.

We will then briefly note the advantages in some law of war contexts of some flat rules over even the most subtle balancing tests, while still appreciating the value of balancing tests in other contexts, at least as applied to certain sorts of combatant forces. At the end of the day, we will want that combination of rules and balancing tests, appropriately applied to the appropriate parties, that offers us the best combination of progressive content and

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otherwise mysterious.

43. *See supra* text accompanying notes 31, 36-38.

44. The texts refer to a limited class of military advantage that is, simply, "anticipated" by the attacker. *See supra* text accompanying notes 31, 36-38. Whether all anticipated advantages can also be more objectively said to be realistically anticipated, especially given the informational inadequacies and emotional pulls of battle decision-making, is of course doubtful.

45. But presumably not otherwise as readily obtainable, or perhaps realistically obtainable at all. For some vague guidance in the matter of selecting among options, see, for example, Article 57(2)(a)(ii), which states that incidental civilian casualties are to be avoided, or at least minimized, through all "feasible" precautions. Protocol I, *supra* note 25, art. 57(2)(a)(ii). In some ways, this sort of guidance tends to complicate, rather than clarify, matters for decision-makers. See also the complications raised *supra* note 33.

46. *See supra* text accompanying notes 31, 37-38.

47. *See* Parks, *supra* note 35, at 170-75.

48. *See infra* Part V.

49. *See infra* notes 59-80 and accompanying text.

realistic enforceability of the law of war, while recognizing the value of at least some uniformity of application of the law of war.

III. LEGAL BALANCING TESTS IN THE FOG OF WAR: INDETERMINACIES IN AVOIDING UNJUSTIFIABLE CIVILIAN CASUALTIES

For the sake of simplicity, let us say that no attack may be undertaken or continued if the incidental harm to noncombatants may be expected to be excessive or disproportionate. For this purpose, civilian deaths, civilian injuries, and damage to civilian objects count as the relevant costs.[50] On the other side of the metaphorical balance stands "the concrete and direct military advantage anticipated."[51] Of course, the military value of an attack cannot justify incidental civilian casualties that are unnecessary in that the same or an equal military advantage could have been gained by means involving fewer anticipated but incidental civilian casualties.[52]

Without rising from our armchairs, we can see some of the disturbing indeterminacies involved in this sort of balancing. Suppose, for example, an opponent's war council meets in the evenings in the otherwise deserted leading art museum, in a room full of invaluable paintings. The war council also meets during the daytime at a secluded restaurant, attended by civilian and non-civilian restaurant staff. Can we say without doing some additional moral thinking which attack is better under the relevant law of war?

The law seeks to reduce indeterminacy by disregarding any military advantage that is not "concrete and direct."[53] Reducing indeterminacy in the law is doubtless usually a good thing. But here, reduced indeterminacy requires some price in realism, and in the credibility of the law. Military operations, like moves in chess, are sometimes sensibly undertaken with an eye toward indirect, long-term payoffs, whether such payoffs are certain or not.[54] We

50. *Id.* Who counts as a civilian, and what sorts of infrastructural elements count as civilian objects, of course raise traditional problems. For some specific complications, see *infra* text accompanying notes 158-59.

51. *See supra* text accompanying notes 37-38.

52. See in particular Protocol I, *supra* note 25, arts. 57(1), 57(3).

53. *See supra* text accompanying notes 37-38, as well as further complicating questions referred to *supra* note 33 and *infra* text accompanying note 56.

54. Consider as one possible example the largely morale-oriented Halsey-Doolittle April 1942 air raid over Tokyo and other cities, in which both demolition and incendiary bombs were intended to be dropped on Japanese industrial centers. Our point here is not to ask about the disproportionality of the civilian casualties and damage or to ask whether some civilian casualties in such a case should have been classified as intended rather than as merely

could, presumably, simply classify home-front morale-boosting raids as conferring a concrete and direct military advantage. But then, what sorts of worthwhile military goals could not be classified as concrete and direct? Much of the supposed value of focusing on the concrete and the direct would then be lost.

The law must then adopt one standpoint or another in determining how many incidental civilian casualties could have been expected at the relevant times. Those who best know the overall strategic military plan may not best know the relevant capacities and limitations in a specific context of the weapons in question, and yet a third group may best know the current conditions on the ground, the presence and disposition of actual civilians, etc.[55] Even if all the relevant decision-makers can timely coordinate, the decision-makers' perceptions will of course be distorted by their loyalties, biases, and preconceptions, often under trying emotional circumstances and severe time pressure. How much allowance, if any, should the law of war make in this context for both avoidable and unavoidable human frailty?

Suppose a military decision-maker is charged with inflicting excessive or disproportionate incidental civilian casualties. Could the decision-maker defend by claiming that while the casualties may seem excessive in the narrow context of the discrete military battle itself, the casualties were not excessive in the broader context of the successful military campaign of which the narrower battle was a key element? Is this broader military success sufficiently direct? What if there were in fact correspondingly few inadvertent civilian casualties elsewhere during the campaign? Questions of the proper level of the breadth of examination thus add further indeterminacy.[56]

Even more difficult is the broad range of cases in which some additional degree of civilian safety can be purchased at some further personal risk exposure on the part of some number of combatants.

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incidental. Instead, we emphasize merely that the major point of the raid really could not be considered to be a concrete and direct military advantage, as opposed to morale-building. For an authoritative explication, see B25B Special Project Memo, http://www.ibiblio.org/hyperwar/AAF/rep/Doolittle/B25B-Special.html (last visited Jan. 15, 2003) (contemporaneous memorandum specifying that "[a]n action of this kind is most desirable now due to the psychological effect on the American public, our allies and our enemies").

55. Parks, *supra* note 35, at 175-77.

56. *Id.* at 176-77. For elaboration of level of generality problems in other contexts, see generally J.M. Balkin & Sanford Levinson, Symposium, *Constitutional Grammar*, 72 TEX. L. REV. 1771 (1994); Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985). *See also* Parks, *supra* note 35; *supra* text accompanying note 53.

Let us suppose that the higher the altitude at which bombing occurs, the greater the inaccuracy, and the greater the number of inadvertent civilian casualties. We shall set aside questions of responsibility for civilian deaths from the defender's own electronic countermeasures and anti-aircraft fire. Generally, the higher altitude the bombing, the fewer the attacker's (and perhaps the defender's) military casualties. Once one has guessed at all of the available tradeoff options, which strategies, if any, are reasonably pilot-protective and militarily effective while at the same time not leading to disproportionate civilian casualties?[57] Note that even civilians generally may have some stake in pilot safety. Even civilians may not want to unduly increase risks to military pilots, at some incidental cost to themselves as civilians, lest morally worthy and popular humanitarian military interventions not be undertaken, or lest ground combat become more prominent.

The Protocol I texts do not explicitly acknowledge any of the above difficulties, nor do they explicitly adopt either strict liability, a "grossly excessive" standard, or a subjective and reasonable good faith standard. Perhaps there is intended a vaguely aspirational[58] quality to the rules—a hope that such open-textured rules can be progressively interpreted more demandingly over time.

We can gain a better and more concrete sense of some of the inherent problems in the Protocol I texts addressing incidental civilian casualties by referring to the American military experience in Afghanistan. In this conflict, American military officers and legal staff routinely attempted to assess the risks of the contemplated particular action to noncombatants in advance.[59] Such assessments could, in many cases, be based partly on information gathered in remarkable ways. Remotely piloted armed spy planes were often capable of providing Pentagon officials clear images of small objects with only a 1.5 second time delay.[60]

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57. Consider generally the almost continuous choice between higher and lower altitude bombing, or between daylight and night time bombing in World War II, as well as the complications caused by inadvertent civilian deaths directly via defender anti-aircraft fire. *See* Parks, *supra* note 35, at 177-78. For a discussion of the moral justifiability of some forcible interventions, see R. George Wright, *A Contemporary Theory of Humanitarian Intervention*, 4 FLA. J. INT'L L. 435, 435 (1989).

58. *Cf.* Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 262 (1993) (discussing an aspirational reading of the U.S. Constitution).

59. John H. Cushman, Jr., *Ideas & Trends; War's Hidden Cost*, N.Y. TIMES, Dec. 9, 2001, *at* http://query.nytimes.com/search/article-page.html?res=9506E0DA113CF93AA35751C1A9679C8B63.

60. Michael Evans, *Spy-Plane TV Offers Instant Missile Targets*, TIMES (London), Jan. 23, 2002, at 15, *available at* 2002 WL 4175864. For a discussion of some operational problems and limitations of the Predator spy plane, see

More generally, a range of different technologies unavailable even as of the Persian Gulf War have contributed to the increasing technical ability to discriminate between military targets and civilians and to reduce unintended casualties among the latter.[61] Many more weapons systems are in this sense "smart."[62] They can be much better coordinated than formerly,[63] and their cost has generally come down significantly.[64] Local Afghan spotters on the ground also contributed information of varying quality,[65] which could potentially be acted upon quickly.[66]

But even with multiple spotters and confirmation requirements,[67] mistakes of various sorts and magnitudes occur. Let us first appreciate that the military resistance in Afghanistan apparently did not include skilled cyber-warriors, electronic jamming (which may or may not reduce civilian casualties), or even a credible air force.[68] These circumstances may not always exist. But even under these in some respects simplified circumstances, a number of inescapable indeterminacies plagued American military judgments of discrimination and proportionality.

In the Afghan conflict, for example, noncombatants intermixed with combatants in ways ranging from innocent and ordinary to manipulative and strategic.[69] One fleeing Afghan civilian told an Associated Press reporter that bombs intended for a tunnel complex had instead hit a village two miles from the complex, destroying most of the thirty-five village homes, killing fifteen civilians, and injuring others.[70] Such tragic errors were hardly isolated. One

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Thom Shanker & James Risen, *A Nation Challenged: Raid's Aftermath; U.S. Troops Search for Clues to Victims of Missile Strike*, N.Y. TIMES, Feb. 11, 2002, at A12, *available at* LEXIS, Nexis Library, N.Y. Times File (explaining that performance suffered at night and in bad weather, that the Predator experienced excessive breakdowns, and that sometimes the time of availability of targets was insufficient).

61. *See* Ricks, *supra* note 6, at A1.

62. *Id.*

63. *Id.*

64. *Id.*

65. *See* Karl Vick, *Afghan Spotters Vital to Pinpointing Enemy; Civilians Led Planes to Targets*, WASH. POST, Jan. 13, 2002, at A1, *available at* 2002 WL 2520837.

66. *Id.*

67. *Id.*

68. *See* Ricks, *supra* note 6, at A1.

69. *See* Dana Priest, *In War, Mud Huts and Hard Calls; As U.S. Teams Guided Pilots' Attacks, Civilian Presence Made Task Tougher*, WASH. POST, Feb. 20, 2002, at A1, *available at* 2002 WL 13818959.

70. Associated Press, *U.S. Planes Bomb Suspected Hide-Outs*, Jan. 14, 2002, *available at* http://prop1.org/nucnews/2002nn/0201nn/020114nn.htm.

correspondent wrote that, "[i]n a succession of villages, precision-guidance munitions from U.S. aircraft sometimes hit precisely the wrong targets as pilots and their allies on the ground tried to distinguish between fleeing or hiding targets and vulnerable, exposed civilians."[71] The "air war . . . left a string of mistakes across southern Afghanistan."[72]

These unintended civilian casualties had various causes and were of various sorts. Some apparently involved a failure, unique or recurring, in some aspect of the weapons systems involved,[73] while others apparently involved intelligence errors in the identification of targets.[74] In at least one incident, intentionally false local intelligence reports, allegedly based upon local rivalries and score-settling, may have contributed to the mis-targeting of Afghan forces fighting against the Taliban.[75] These mistakes could involve a range of decision-maker states of mind.

Estimates of the total number of civilian casualties in the Afghan conflict, generally or directly attributable to discrete American military actions, vary widely and are difficult to verify,

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71. Susan B. Glasser, *Afghans Live and Die with U.S. Mistakes; Villagers Tell of Over 100 Casualties*, WASH. POST, Feb. 20, 2002, at A1, *available at* 2002 WL 13818914.

72. *Id.*; *see also* Molly Moore, *Fleeing U.S. Bombs, Villagers Found No Place to Hide; Missiles Killed 21 in Two Families, Survivors Say*, WASH. POST, Feb. 13, 2002, at A1, *available at* 2002 WL 13817079 (discussing alleged thirty-minute period during the night of October 21, 2001, in which missiles accurately hit precisely intended targets, but where those targets turned out to harbor two families including seventeen children, rather than Taliban or Al Qaeda personnel); Doug Struck, *Men Hit in U.S. Missile Strike Were Scavengers; Relatives Say Afghans Were at Al Qaeda Site For Scrap Metal to Sell*, WASH. POST, Feb. 12, 2002, at A13, *available at* 2002 WL 13816974 (discussing alleged incident of February 4, 2002 in which an accurately aimed missile strike killed three adults looking for marketable scrap metal at the site of a previously bombed Al Qaeda camp).

73. *See, e.g.*, Barry Bearak, *A Nation Challenged: Casualties; Uncertain Toll in the Fog of War: Civilian Deaths in Afghanistan*, N.Y. TIMES, Feb. 10, 2002, at A1, *available at* LEXIS, Nexis Library, N.Y. Times File. A somewhat similar problem involves cluster bombs that fail to detonate on contact, in effect becoming land mines, and dangerous over time to civilians. *Id.*

74. See the two sets of circumstances briefly described *supra* note 72. See also the several alleged incidents reported by Barry Bearak *supra* note 73, at A1.

75. Carlotta Gall & Craig S. Smith, *A Nation Challenged: Raids Revisited; Afghan Witnesses Say G.I.'s Were Duped in Raid on Allies*, N.Y. TIMES, Feb. 27, 2002, at A1, *available at* LEXIS, Nexis Library, N.Y. Times File; Thom Shanker, *U.S. Says 16 Killed in Raids Weren't Taliban or Al Qaeda*, N.Y. TIMES, Feb. 22, 2002, at A1, *available at* LEXIS, Nexis Library, N.Y. Times File; Michael Ware, *How the U.S. Killed the Wrong Soldiers*, TIME, Feb. 11, 2002, at 8, 8, *available at* 2002 WL 8385696.

with the biases of the estimator occasionally filling gaps in the available evidence.[76] While some further reductions in civilian casualties may require only further technological advances, sounder engineering or production, or redesigns,[77] others may require revisions in strategy or greater self-restraint in war-fighting.[78] Consider the tradeoffs between the desire for multiple and independent confirmations of a military target, and the freshness and currency of the information by the time the information is collated and analyzed.[79]

More broadly, it may be tempting, especially for an interested party, to argue that in some cases resolving close calls in favor of attack, rather than restraint, may increase inadvertent civilian casualties but also shorten the war and thereby reduce the overall civilian casualty toll. It may not be obvious even to the civilians why it is right to care scrupulously about avoiding particular civilian casualties if this may mean delaying a presumed military victory that would save a far greater number of civilians.[80] The early routing of a presumed brutal, incompetent, or generally inept regime may itself save many civilians. We shall address related problems below.[81]

IV. THE VALUE AND LIMITATIONS OF BALANCING TESTS IN THE LAW OF WAR

The law of war requires that incidental civilian casualties not be excessive or disproportionate to "the concrete and direct military advantage anticipated"[82] from the operations inflicting these casualties. One natural interpretation of this language of excess and disproportion is as some sort of balancing test. As such, this

76. *See, e.g.*, Bearak, *supra* note 73, at A1.

77. Presumably it is possible to design any munition to disarm or deactivate itself, or be disarmed by remote command, if it fails to detonate on impact. For background, see Major Thomas J. Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F. L. REV. 229, 247-53 (2001).

78. The process of verifying and approving of targets can presumably be made more or less stringent. *See* Thomas E. Ricks, *Un-Central Command Criticized: Marine Corps Report Calls Fla. Headquarters Too Far From Action*, WASH. POST, June 3, 2002, at A1 (discussing alleged lost opportunities to attack opposing military positions due to prolonged or careful target verification and clearance processes).

79. A real-time video image brings the value of currency of information, but different sources may have different interpretations of what the video image depicts.

80. For reference to the alleged lost military opportunity dimension, see Ricks, *supra* note 78, at A1.

81. *See infra* Part VI.

82. *See supra* notes 33, 37-38 and accompanying text.

provision may share some of the advantages and disadvantages of weighing and balancing in decision-making generally, as well as its own contextual advantages and disadvantages.

We should not assume that it is not possible to reasonably weigh risks of incidental civilian casualties against some sort of military advantage merely because the two considerations are not commensurable, or measured in mutually translatable units. Problems of commensurability may be real and even typical without being fatal or universal. We should not rule out the possibility of the necessary comparisons between risks to civilians and military advantages with undue haste. Rigorously demonstrative certainty may be unattainable. But sometimes, one value may outweigh another on any reasonable calculus that reflects the relevant basic human interests and purposes at stake.

Consider a few examples. Sports performance comparisons are often notoriously difficult and controversial. But let us suppose merely that someone claims that "Henry Aaron was a better hitter in baseball than Eddie 'The Eagle' Edwards was an Olympic ski jumper."[83] Can we really say no more than that this is a contestable, subjective evaluative judgment across different sports and times, on which reasonable minds may differ? If someone sincerely took this latter, skeptical position we would be unlikely to give up, or to reassess the merits of the Aaron versus Edwards debate. More likely, we would conclude that such a person either did not understand something about sports, or had lost track of what sorts of judgments this comparison does and does not require.

Let us consider a different example. Can we reasonably compare the length of lines and the weight of rocks?[84] In some cases, we can. A line can be shorter, reasonably, than a rock is heavy. A one Angstrom unit length line is shorter than a rock-formation asteroid due to catastrophically collide with the earth is heavy, for any significant purpose linked to human interests and projects, and thus non-arbitrarily. Or if we doubt this, consider an admittedly extreme hypothetical case in the law of war. Let us put some

83. Eddie "The Eagle" Edwards competed with a conspicuous lack of success at the Calgary Winter Olympics in 1988. *See, e.g.*, Dave Kindred, *Only at the Winter Games*, SPORTING NEWS, Feb. 11, 2002, at 60, 60.

84. As addressed in Symposium, *When Is a Line as Long as a Rock is Heavy?: Reconciling Public Values and Individual Rights in Constitutional Adjudication*, 45 HASTINGS L.J. 708 (1994). The assumption that much of the difficulty in comparing incidental civilian casualties with direct military advantage stems from their being "unlike quantities and values" is expressed in Lieutenant Colonel William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 94-95, 102 (1982).

number of incidental civilian fatalities in the metaphorical[85] scales against a military advantage thereby obtainable. Consider, by way of context, the Falklands/Malvinas War between Great Britain and Argentina in 1982.[86] Can we not say that in such a context, an additional million incidental civilian fatalities would have been excessive or disproportionate in relation to a connected military advantage that tipped the outcome of the war in either direction? Would this conclusion be appropriately coherent and reasonable? Would a denial of this conclusion really be equally reasonable? Would not a million civilian casualties be excessive on any reasonable comparison? We therefore cannot simply dismiss the possibility of a balancing[87] interpretation of the legal prohibition on excessive or disproportionate incidental casualties. We should instead try to assess the coherence, workability, and limitations of such an interpretation. We will want to consider the value and limitations of legal balancing tests generally, as well as in the context of today's law of proportionality between incidental civilian casualties and direct military advantage.

To some degree, the values and the limitations of an "excessiveness" test, in which civilian casualties are balanced against military advantage, parallel those of legal balancing tests in general. Balancing tests in the law are often thought to share with legal "standards" and "principles" the virtues of flexibility and responsiveness to circumstance and context.[88] In contrast, flat, fixed rules in the law are said generally to provide better guidance and

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85. *See, e.g.*, JOHN BROOME, WEIGHING GOODS: EQUALITY, UNCERTAINTY AND TIME 7 (1991) (referring to "the metaphor of *weighing*").

86. *See, e.g.*, RAPHAEL PERL, THE FALKLAND ISLANDS DISPUTE IN INTERNATIONAL LAW AND POLITICS (1983). We of course here take neither side, just as it would presumably be counterproductive to weight any military advantage to a "just" antagonist as positive, and a similar advantage to an "unjust" antagonist as negative, so that any civilian casualties inflicted by the latter are illegal. This kind of assessment really returns us to *jus ad bellum* questions. *See, e.g.*, RICHARD J. REGAN, JUST WAR: PRINCIPLES AND CASES 18 (1996).

87. This is not to deny the complications introduced by distinguishing among different forms of balancing. *See generally* David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641 (1994) (discussing Madisonian adjudicative balancing of all implicated government interests and contrasting Madisonian balancing with definitional balancing and *ad hoc* balancing).

88. *See also* Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 278 (1982) ("General rules cannot account for all possible situations."). *See generally* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261 (1995).

predictability, at some cost in adaptiveness.[89]

Importantly, though, balancing incidental civilian casualties against military advantage offers neither the advantages nor the disadvantages of completely open-ended all-things-considered balancing.[90] The law of war does not engage here in such inclusive, broad balancing. The law of war thus does not weigh into the balance anything like, say, the effects of incidental casualties on the local tourist trade, or the asserted moral righteousness of either party's reasons in going to war in the first place.[91] The law of war's balancing of incidental civilian casualties against some concrete and direct military advantage thus is not an invitation to uninhibitedly consider all directly or indirectly relevant factors.

It is admittedly tempting to allow, say, Nazi Germany no room for causing incidental civilian casualties, given the obvious negative overall value of any Nazi military advantage. But there would be substantial disadvantages in doing so. It would be impossible to disentangle the narrow incidental civilian casualty inquiry from the broader, prior issue of the justice of the attacking party's cause in general. There is legally enough to object to independently with respect to Nazi aggression, Nazi intentional killings during war, and so on, without short-circuiting any inquiry into any Nazi violation of mere proportionality.[92]

Balancing in the incidental civilian casualty context may prove to be of modest value, but not primarily for reasons ordinarily cited in a general critique of legal balancing. Some fear that over time, balancing tests generally tend to become too safe, too predictable,

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89. *See* Chen, *supra* note 88, at 261.

90. There is certainly some appeal in aspiring to take all, and not just some, relevant interests into account when balancing. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 1001 (1987).

91. Of course, the traditional just war criteria have required justice in one's cause in going to war as well as in the war fighting, including, on some statements, a proportionality between one's cause for war and the magnitude, character, and effects of one's military response. For reference to the just war requirements of proportionality *ad bellum* as opposed to the narrower requirement of proportionality as an element of *jus in bello*, see, for example, JAMES TURNER JOHNSON, MORALITY & CONTEMPORARY WARFARE 27-28 (1999); PAUL RAMSEY, THE JUST WAR 189-210 (1968); REGAN, *supra* note 86, at 63-64 ("The decision to wage war will be justified only if the wrong to be prevented or rectified equals or surpasses the reasonably anticipated human and material costs of the war.").

92. For a recent re-examination of the Nuremberg Trials in a much broader and largely American context, see generally PETER H. MAGUIRE, LAW AND WAR: AN AMERICAN STORY (2000); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992).

too middle of the road, and eventually "a routine and mindless process."[93] On the other hand, some say that general legal balancing provides insufficient predictability.[94]

To the first concern, we may say that unless the future of war surprisingly provides many actually adjudicated incidental civilian-casualty-balancing cases, we are unlikely to accumulate enough precedents to achieve much precedent-based predictability. The technical aspects of combat and even of military advantage may, in particular, change sufficiently rapidly as to undermine the relevance of earlier legal precedents.

More importantly, though, each case of incidental civilian casualties, and each set of expected direct and concrete military advantages accruing therefrom, is likely to be unique in significant respects. The remarkable complexities of battlefield assessments would be matched by the complexities of re-evaluation at trial. The battlefield assessments, even under the best of circumstances, would also be strongly colored by emotion and stress,[95] and by imperfect information and reasoning. In particular, to try to predict even the direct military advantage to be gained only by exposing a civilian population to some additional hazard is to risk drowning in unknown contingencies, unexplored alternatives, and disputable assessments of the value of the advantages in question.

A final complication is that the attacking commander or political leader may choose to state the military aim of an attack only in vague, unverifiable, nearly self-fulfilling, or unempirical terms—not, for example, to capture this or destroy that, but to some unspecified degree merely to "degrade" temporarily a local

93. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1080 (2002); *cf.* Jean Bethke Elshtain, *Third Annual Grotius Lecture: Just War and Humanitarian Intervention*, 17 AM. U. INT'L L. REV. 1, 12 (2001) (referring to unduly "routinized" calculation and classification of incidental civilian casualties).

94. Benno C. Schmidt, Jr., Nebraska Press Association*: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 463-64 (1977), *cited in* Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 675 n.12 (1983).

95. Professor Vincent Blasi warns of the risks of complex balancing tests in the area of free speech, particularly during times of unusual stress and public emotion, including war. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 450 (1985) [hereinafter Blasi, *Pathological Perspective*]; *see also* Vincent Blasi, *The Role of Strategic Reasoning in Constitutional Interpretation: In Defense of the Pathological Perspective*, 1986 DUKE L.J. 696, 704 (1986). In the military context more specifically, "in the heat and haste of battle reliable information may be as hard to get as cool calculation will be hard to undertake." GEOFFREY BEST, WAR AND LAW SINCE 1945, at 327 (1994).

opponent's capacity to attack again.

Paradoxically, all these uncertainties add in a real sense to the predictability of the application and enforcement of the incidental civilian injury balancing test. Such a provision, interpreted as a complex balancing test, would likely not be called upon to do much important post-war adjudicatory work. Consider current religiously motivated groups, or the admittedly extreme case of a latter-day Third Reich. Would charges of mere imbalance, of mere excessiveness, in unintended civilian casualties likely be either relatively easy to prove, or genuine and important contributions to the moral weight and gravity of any international legal indictment? Or would such charges rather be distracting, complex, inherently secondary occasions for speculation, subjectivity, and potentially endless debate?

As we will see below, there is actually some room for usefully invoking the incidental civilian casualty provisions of Protocol I even as a balancing test.[96] But it is difficult to imagine such a balancing test provision vitally and indispensably serving as a frequently invoked principle against defeated states or groups in actual international legal adjudication. We should, however, consider the possibility of interpreting the prohibition of "excessive" or disproportionate incidental civilian casualties as something other than a balancing test. We turn to that task now.

V. RULES VERSUS BALANCING AND THE DEBATE OVER PROPORTIONALITY

As we have seen, the most obvious way to interpret the law's prohibition of excessiveness or disproportionateness[97] of incidental civilian casualties is somehow to balance the relevant sort of military advantage gained thereby. Not all rules of war, however, seem to call for any direct, explicit balancing. The principle of combatant-civilian discrimination itself does not in this sense call for balancing. The basic rule of combatant-civilian discrimination runs as follows: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and

96. *See infra* text accompanying notes 110-13.

97. *See* L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 152 (1993) (linking incidental civilian casualties to the "proportionality rule"); Parks, *supra* note 35, at 170-71. *See generally* Olivera Medenica, *Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality?*, 23 LOY. L.A. INT'L & COMP. L. REV. 329, 360-64 (2001) (describing the history of the proportionality doctrine).

accordingly shall direct their operations only against military objectives."[98]

More specifically, "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[99]

The most obvious reading of these provisions on intentional attacks on civilians is as prohibitory rules, within their scope, rather than as invitations to balance. There is no sense that a force can intend or aim at the deaths of protected civilians if there appears to be a sufficient military advantage in doing so.[100] Nor can a force intend or seek the deaths of civilians even if the ensuing terror would likely bring victory or shorten the war.[101] Under these target discrimination rules, intentional as opposed to incidental[102] killings of civilians cannot be legally immunized by sufficiently good consequences. The discrimination rules in this sense amount to genuine rules, as opposed to explicit balancing tests.

There is nothing inconsistent in prohibiting intentional killings of civilians by a flat rule, while subjecting incidental killings of civilians to a balancing test. But this distinction alerts us to another possibility. Perhaps we need not read the language of "excessiveness" or proportionality[103] regarding incidental civilian casualties to call for a balancing test. Perhaps even the language of proportion and excess can be read to evoke rules, rather than balancing, if there turns out to be a practical point to doing so.

The general idea of proportionality is familiar to us from domestic law contexts. Some sort of proportionality requirement is typically imposed in cases of self-defense[104] and criminal

98. Protocol I, *supra* note 25, art. 48.

99. *Id.* art. 51(2).

100. *See supra* text accompanying notes 97-98.

101. *See supra* text accompanying note 98.

102. Some aspects of the moral differences between intending someone's death, however regretfully, as opposed to merely foreseeing such a death as an unintended side effect, and not as an end in itself or as a means to a desired end, have been widely discussed under the rubric of the principle of double effect. *See, e.g.*, Joseph M. Boyle, Jr., *Toward Understanding the Principle of Double Effect*, 90 ETHICS 527, 528-29 (1980); R.G. Frey, *Some Aspects to the Doctrine of Double Effect*, 5 CANADIAN J. PHIL. 259, 261-64 (1975); John Makdisi, *Justification in the Killing of an Innocent Person*, 38 CLEV. ST. L. REV. 85, 85-87 (1990); Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFF. 334, 336 (1989).

103. *See, e.g.*, Parks, *supra* note 35, at 170-71. For some speculative discussion of the negotiating history in this context of the two largely interchangeable terms, see Fenrick, *supra* note 84, at 105.

104. *See, e.g.*, Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense*

sentencing.[105] Proportionality in the international law of war has long been discussed,[106] admittedly most often in contexts involving the weighing of consequences.[107]

But the idea of proportionality actually need not be interpreted

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Doctrine: A New Dual Requirement Theory of Justification, 2 BUFF. CRIM. L. REV. 191, 205 (1998) (giving an example of proportionate defensive shooting response, despite a toy gun's unrecognized harmlessness); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 476-78 (1996) (describing objective, beyond merely subjectively reasonable, grounds for using the defensive force, given defendant's circumstances); Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 31 nn.120-21, 56 (1986) (comparing emphasis on actual circumstances and actual subjective fears of battering victim with emphasis on "objective reasonableness"); *see also* V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1239 (2001) (questioning a discourse of subjectivity and objectivity in criminal law). For discussion of Thomas Aquinas on proportionality in self-defense, see Germain Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21, 53 (1978).

105. *See, e.g.*, Weems v. United States, 217 U.S. 349, 366-68 (1910).

106. *See, e.g.*, Ziyad Motala & David T. ButleRitchie, *Self-Defense in International Law, the United Nations, and the Bosnian Conflict*, 57 U. PITT. L. REV. 1, 10 (1995) (referring as far back as to the work of Hugo Grotius); Lieutenant Commander Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 136-37 (1998) (referring to the broader proportionality requirement between cause for hostilities and the scope of the military response); Timothy J. Heverin, Case Comment, *Legality of the Threat or Use of Nuclear Weapons: Environmental and Humanitarian Limits on Self-Defense*, 72 NOTRE DAME L. REV. 1277, 1283-85 (1997) (explaining the proportionality inquiry as requiring consideration of environmental consequences).

107. *See, e.g.*, ROBERT L. HOLMES, ON WAR AND MORALITY 193-94 (1989) (comparing good effects to bad effects); Brian V. Johnstone, C.SS.R., *The Meaning of Proportionate Reason in Contemporary Moral Theology*, 49 THOMIST 223, 232-33 (1985) (finding proportionalism as involving a measuring or balance of one or more effects with one or more other effects); David Luban, *Just War and Human Rights*, 9 PHIL. & PUB. AFF. 160, 176 (1980); John Howard Yoder, *How Many Ways Are There to Think Morally About War?*, 11 J.L. & RELIGION 84, 94-96 (1995) (linking proportionality and consequentialism); David Hollenbach, *Responding to the Terrorist Attacks: An Ethical Perspective*, AM., Oct. 22, 2001, at 23, 23 ("*Proportionality* means that the harm that occurs in any use of force must not outweigh the harm already done or that might follow in the future."). Note that this calculation may not seem morally decisive in cases in which a military aggressor seizes some territory and can credibly claim to be uninterested in any further conquest, and can equally credibly promise a tenacious defense of the seized territory. Merely calculative proportionalism may allow only non-military responses in such a case. One further general complication is that we may opt for some sort of flat, absolute rule because, at a deeper level, we think such a rule best balances the various interests at stake. Balancing can occur at different levels of analysis.

in terms of weighing and balancing. Sometimes, the proportionality requirement is stated in terms sufficiently general to encompass more possibilities than just weighing and balancing. There is useful breadth, for example, in the following formulation: "When confronting choices among specific military options, the question asked by proportionality is: Once we take into account not only the military advantages that will be achieved by using the means, but also all the harms reasonably expected to follow from using it, can its use still be justified?"[108]

Such a formulation still refers to "harms," but could encompass any sort of legal justification, and not necessarily justifications involving mere calculation, weighing, or balancing.[109] Not all legal justifications involve balancing. We might well hope for something beyond a balancing interpretation of proportionality in war, simply because the balancing interpretation seems especially difficult to apply, at the time of the military decision, or later judicially. Certainly, there are many areas of the law where intuitive balancing may seem best,[110] but we have more confidence in such balancing

108. U.S. Catholic Bishops' Pastoral Letter, *The Challenge of Peace: God's Promise and Our Response*, *in* JUST WAR THEORY 103 (Jean Bethke Elshtain ed., 1992); *see* PAUL RAMSEY, THE JUST WAR 430 (1983) ("[T]he good accomplished or the evil prevented must be sufficient to justify (in a comparison of effects) the evil that is unavoidably also done."); *see also id.* at 429 (comparing the proportionality rule with the Establishment Clause test in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

109. *See* sources cited *supra* note 107; *see also* Aline H. Kalbian, *Where Have All the Proportionalists Gone?*, 30 J. RELIGIOUS ETHICS 3, 3 (2002) (providing a recent mixed perspective); Janet E. Smith, *Moral Methodologies: Proportionalism*, 19 ETHICS & MEDS. 1 (1994), *available at* http://acad.udallas.edu/phildept/smith/Articles%20mine/set%20of%20mine/Proportionalism%20for%20Medmoral%20newsletter.html (providing a brief critique of proportionalism). Whether we would want to continue to use the language of excess or disproportion in a more rule-bound context would also be an open question. Some writers continue to use the idea of proportionality in contexts where more than calculative weighing and balancing is involved, but others do not. *Compare* Richard A. McCormick, S.J., *Ambiguity in Moral Choice*, *in* PROPORTIONALISM: FOR AND AGAINST 166, 209 (Christopher Kaczor ed., 2000) (portraying proportionate reason inquiry as not reducible "to a simple utilitarian calculus"), *with* Peter Knauer, S.J., *The Hermeneutic Function of the Principle of Double Effect*, *in* PROPORTIONALISM: FOR AND AGAINST, *supra*, at 25, 29 (observing that a commensurate reason (ratio proportionate) says that the entire act must correspond to its end (*actus sit proportionatus fini*), but end means nothing other than reason for the act), *and* Bartholomew M. Kiely, S.J., *The Impracticality of Proportionalism*, *in* PROPORTIONALISM: FOR AND AGAINST, *supra*, at 436, 448 (describing proportionalism as, supposedly, requiring an unattainable common measure for all positive and negative results).

110. *See, e.g.*, Matthews v. Eldridge, 424 U.S. 319, 335 (1976) (three-part due process balancing test); United States v. Carroll Towing Co., 159 F.2d 169,

where we have a reservoir of many similar litigated and unlitigated cases to draw upon.

One response to the difficulties of balancing, then, in the context of war crimes trials, would be to think of excess or disproportion as acting without sufficient legal justification, and specifically as violating a relevant, knowable, established legal rule. Violating the rule would itself constitute the legal unjustifiedness, or as we might still say, the excessiveness or disproportionality of the act. The particular substantive legal rules establishing legal excess or disproportion could be negotiated. Perhaps something like the use of the most discriminating arms technology culturally available, in any permissible and potentially effective general arms category, could be required. The legal focus could be on discriminating arms in an attempt to set reasonably determinate and potentially enforceable legal limits. Something like this approach is often applied in the complex domestic legal area of pollution control technology.[111]

The law of war could in this respect be adjusted to accommodate both rich and poor groups. While dominant cultures would presumably do most of the selling of discriminant arms, the law could require buyer subsidies. Any group should be able to obtain a binding declaratory judgment that as of a given time, a particular weapons technology qualifies as the most potentially discriminant in its category. Such judgments are bound to be complex and controversial in some cases, and it is best that such legal judgments be made before, rather than after, a war is over. As both arms buyers and arms sellers would realize, unfortunately, more discriminant weapons will also pose a greater danger not only to military targets, but to innocent civilians, if deliberately aimed at such persons. Of course, using discriminant weapons to intentionally attack civilians would be an even more egregious violation of the law of war.

Legal attempts to limit incidental civilian casualties may have some value, though, even where such provisions are difficult to enforce. We may assume at least hypothetically that not all combatant groups are disposed to take international legal limitations on incidental civilian casualties with equal seriousness.

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173 (2d Cir. 1947) (tort negligence calculus). Compare the assumptions in Michael Walzer, *Five Questions About Terrorism*, 49 DISSENT MAG. (2002), *at* http://www.dissentmagazine.org/menutest/archives/2002/wi02/walzer.shtml (last visited Jan. 28, 2003).

111. *See, e.g.*, Alaska Dep't Envtl. Conservation v. U.S. Envtl. Prot. Agency, 244 F.3d 748, 749 (9th Cir. 2001) (discussing EPA air pollution requirement of "Best Available Control Technology").

Some combatant groups may be more concerned than others with their general, cross-cultural reputation for compliance with the laws of war. Some combatant groups may be disposed to see almost any military advantage accruing to their forces as outweighing almost any level of incidental civilian casualties. Some, indeed, use their own or other civilians in conscious attempts to shield their own military from attack.[112] And some even count intentional killings of foreign civilians and the intentional destruction of alien religious and cultural objects[113] as a good thing. Such groups may not be particularly troubled by doing incidentally what they have sought to do deliberately, particularly if they perceive the international legal system as stacked against them.

For combatant groups that can be classified as, at least over the short term, relatively insensitive to some of the relevant international legal norms, the practical difference between a balancing and a non-balancing interpretation of the incidental civilian-casualty law may be limited. Perhaps a flat, unequivocal, clear rule intended to reduce incidental casualties might for such groups have a slightly greater deterrent effect than a balancing test, which might be seen as more of an invitation to post-war debate.

We can imagine that if a group believes that the laws of war are unfair or will be applied unfairly, that group may fear and steer cautiously around vague and easily manipulated balancing tests. But it is not clear how many combatant groups are inclined to react in this way. On the other hand, for combatant groups that at least in the short term are especially sensitive to the relevant international legal norms, a vague balancing test might more clearly minimize incidental civilian casualties. A reputationally-sensitive combatant knows that under a vague balancing rule, any level of incidental civilian casualties may, in some quarters, be deemed too much, regardless of which weaponry was used, or how carefully, and therefore an at least arguable violation of the law. Under a balancing test, therefore, a reputationally-sensitive combatant will feel some additional public pressure to reduce incidental civilian casualties to a minimum.[114]

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112. *See supra* notes 7, 34-35 and accompanying text.

113. *See, e.g.*, Edward Girardet, *The Buddha Tragedy and Beyond*, CHRISTIAN SCI. MONITOR, Mar. 14, 2001, at 11, 11 (discussing destruction of Buddhist archeological sites by the Taliban regime in Afghanistan).

114. We are assuming here that relatively law-sensitive combatant groups will seek to avoid violations of the law of war, and to some degree will seek to avoid acting in ways that raise the possibility of even a colorable claim of violation of the laws of war. Presumably such a relatively law-sensitive combatant group will seek to minimize the gravity of any violations of the law of war. For a general background, see Oren Gross, *The Grave Breaches System*

Thus, it seems possible that some sort of fixed rule might minimize incidental civilian casualties inflicted by some less reputationally-sensitive combatants, whereas a balancing test might minimize such casualties inflicted by more reputationally-sensitive combatants. Overall, a balancing test might therefore seem best, on the grounds that the less reputationally-sensitive combatants will not likely be sensitive to differences in the form of the incidental casualty rules, and that such combatants will also likely be liable for more serious intentional violations of the law of war. But one could, on the other hand, conclude overall in favor of a flat rule, on the grounds that the most reputationally-sensitive combatants will, to some degree, be moved by critical and world opinion even where actual violations of the law of war are not in issue.

The ultimate choice in this context as between a rules versus a balancing interpretation, assuming that the law requires some single uniformly applicable formulation, should appropriately balance considerations of compliance and realistic enforceability and genuinely progressive substantive legal content. One consideration, among others, is that while a flat rule focusing on the use of the most potentially discriminating technology could have some educative value, a balancing test, even if vaguely formulated, could more directly and explicitly embody the real values at stake, and thus be of even greater educative value over the long term.

Of course, the law of incidental civilian casualties could include a combination of both balancing and fixed rule components, hoping for the best of both worlds. The effects of such mixed rules would vary depending upon whether the mixture jointly constituted an especially stringent but credible rule, or instead allowed compliance merely with any one component of the rule to suffice. Mixed rules might be designed to affect rich and poor groups differently. More complex forms of mixed rules would presumably have even more unpredictable and judicially debatable effects.

VI. MORE THOUGHTS ON THE UNTHINKABLE: COULD INTENTIONAL CIVILIAN CASUALTIES EVER BE JUSTIFIED?

A. The Available Conceptual Tools

Let us suppose that we could somehow know that intentionally inflicting some number of civilian casualties would likely result in

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and the Armed Conflict in the Former Yugoslavia, 16 MICH. J. INT'L L. 783, 785-86 (1995) (discussing the grave breaches system and its relationship with international humanitarian law). *See also id.* at 792-93 (discussing the need for respect, uniform practice and compliance, and education regarding egregious conduct).

some immense military payoff, or even the permanent avoidance of some moral catastrophe in favor of a much better permanent outcome. Let us also assume that there is no substantially less morally objectionable way of attaining anything like these moral goals. As well, we can specify that none of the potential civilian casualties is at fault in seeking strategically to manipulate the conduct of the war, or is being manipulated strategically by any antagonist.

How are we to think about the unthinkable?[115] This task has been undertaken in the context of actually intended civilian casualties by Michael Walzer and by other observers of war and morality.[116] We can begin to reconstruct some of the thinking involved by first noting the general distinction between what are called deontological and consequentialist approaches to ethical decision-making.

The boundaries between deontological and consequentialist reasoning, and perhaps even the concepts themselves, are not particularly clear.[117] Roughly, the idea is that consequentialism evaluates, let us say, acts, by reference to the consequences that actually flow or that might flow from one or more persons' doing a particular act.[118] Acting wrongly, based on a consequentialist view, involves something like "failing to maximize good consequences and/or minimize bad consequences."[119]

In contrast, deontologists hold that the wrongness of an act consists not, or at least not entirely, in the consequences of the act, but in something like the moral quality of the act, intrinsically, or in itself, perhaps as performed in some particular context.[120] Thus, for

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115. This borrows the formulation of Herman Kahn. HERMAN KAHN, THINKING ABOUT THE UNTHINKABLE (1962).

116. *See infra* notes 146-52, 173-76 and accompanying text.

117. *See, e.g.*, Walter Sinnott-Armstrong, *An Argument for Consequentialism*, 6 PHIL. PERSP. 399, 409 (1992) ("[I]t is still hard to classify some moral reasons as consequential or deontological . . . .").

118. *See, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 5 n.8 (2002) (explaining the consequences of adoption as opposed to "what are deemed to be relevant characteristics of the acts in question"); *see* Sinnott-Armstrong, *supra* note 117, at 408-09. For a brief distinction in our general context, see REGAN, *supra* note 86, at 92.

119. Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 252 (1996) [hereinafter Hurd, *Deontology*]; *see also* Heidi M. Hurd, *What in the World is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 161 (1994) [hereinafter Hurd, *What in the World*].

120. *See* Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203, 2210-11 (1992) [hereinafter Hurd, *Justifiably*]. We shall here simply assume that there is some sufficient distinction between the character of an act and its consequences.

the deontologist, an act might in some sense maximize good consequences, yet nonetheless be morally wrong because of its very nature.[121]

It may initially seem more natural for a deontologist to argue that "if the norms of morality prohibit the action of killing an innocent person, one may not kill an innocent person even if doing so would prevent twenty innocent people from being killed."[122] Many of us certainly feel the moral pull of such a rule in the context of wartime noncombatant immunity. We thus think of the rule prohibiting intentional killing of civilians for a military advantage as indeed a binding rule, not to be outweighed by the presumed better overall consequences associated with the otherwise attainable military advantage. Initially, the deontological approach may seem the more natural way of expressing a binding moral commitment against intentionally killing civilians.

Many of us, though, feel a pull of what may seem to be consequentialist moral logic in some kinds of extreme cases.[123] What if following a rule in an extreme and perhaps unforeseen case would lead to the avoidable loss of thousands or millions of innocent lives? Most of us can offer no real account of when we should become so dissatisfied with the disastrous outcomes of deontological approaches that we should switch to consequentialism, and vice versa. Most of us have no more explicit principle to govern this switch between basic moral vocabularies than we do when we switch our car headlights on or off in response to changing lighting conditions.

Nor can we make much progress by focusing more specifically

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121. *See* SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS 2 (1982) ("[S]tandard deontological views maintain that it is sometimes wrong to do what will produce the best available outcome overall."); Hurd, *Justifiably*, *supra* note 120, at 2209-11; Philip Pettit, *Consequentialism and Respect for Persons*, 100 ETHICS 116, 117 (1989).

122. Hurd, *What in the World*, *supra* note 119, at 161-62; *see also* Hurd, *Justifiably*, *supra* note 120, at 2211. See, in our context, JAMES TURNER JOHNSON, CAN MODERN WAR BE JUST? 28 (1984) ("Warfare in which combatants and noncombatants are perceived and treated as essentially alike is fundamentally against the major moral tradition of war in Western culture.").

123. *Cf.* Hurd, *Deontology*, *supra* note 119, at 253 ("No one is purely a deontologist . . . . Deontological maxims thus function to trump otherwise legitimate consequential calculations."). In our context, we may ask whether considerations of morally relevant consequences could ever in some sense trump a quite generally appealing morally based rule of civilian immunity. For one heroic attempt to mix consequentialist and deontological elements in a common formula, see Robert M. Veatch, *Resolving Conflicts Among Principles: Ranking, Balancing, and Specifying*, 5 KENNEDY INST. ETHICS J. 199, 211 (1995).

on any particular version of consequentialism. Consequentialism and its popular subcategory, utilitarianism, come in a variety of forms, along several dimensions. There are, for example, act consequentialism,[124] rule consequentialism,[125] and motive consequentialism.[126] Rule consequentialism may vary according to whether we think of only a single person, of many persons, or of everyone universally following a proposed rule.[127] Assuming universal adherence to a rule is, however, particularly unrealistic and dangerous in the context of war, at high stakes, between deeply opposed military forces.

Utilitarianism is in turn further divided into hedonistic[128] and non-hedonistic,[129] and particularly preference-oriented,[130] forms. And just as there are act and rule-consequentialisms, there are act and rule-utilitarianisms,[131] along with further subdivisions, including actual rule utilitarianism,[132] ideal rule utilitarianism,[133] and possible rule utilitarianism.[134] In some cases, these varieties of consequentialism[135] and utilitarianism[136] may not be entirely

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124. *See, e.g.*, SCHEFFLER, *supra* note 121, at 2.

125. *See, e.g., id.*

126. *See, e.g., id.* Related to motive consequentialism would be a particularly interesting variant, virtue consequentialism. *See* SHELLY KAGAN, NORMATIVE ETHICS 214 (1998). For a narrower category, see Robert Merrihew Adams, *Motive Utilitarianism*, 73 J. PHIL. 467, 467 (1976).

127. *See* Thomas L. Carson, *A Note on Hooker's "Rule Consequentialism,"* 100 MIND 117, 117 (1991); Brad Hooker, *Rule-Consequentialism*, 99 MIND 67, 67 (1990).

128. *See* SCHEFFLER, *supra* note 121, at 3 n.4.

129. *See id.*

130. *See id.*

131. *See, e.g.*, Donald C. Emmons, *Act vs. Rule-Utilitarianism*, 82 MIND 226, 226 (1973) ("A particular falsehood might be optimific whereas the universal practice would have a very different result."); Tushnet, *supra* note 56, at 1508-19 (discussing the legal distinction between case-by-case balancing and categorical or definitional balancing, involving balancing at a higher level, as akin to the moral philosophical distinction between act utilitarianism and rule utilitarianism).

132. *See, e.g.*, R.B. Brandt, *Some Merits of One Form of Rule Utilitarianism*, *in* JOHN STUART MILL, UTILITARIANISM WITH CRITICAL ESSAYS 324, 327 (Samuel Gorovitz ed., 1971) ("Rule utilitarianisms may be divided into two main groups, according as the rightness of a particular act is made a function of ideal rules in some sense, or of the actual and recognized rules of a society.").

133. *See id.*

134. *See, e.g.*, J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, *in* J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 3, 9 (1973) ("There are two sub-varieties of rule-utilitarianism according to whether one construes 'rule' here as 'actual rule' or 'possible rule.'").

135. *See* Hooker, *supra* note 127, at 70 n.12 ("[R]ule-consequentialism collapses into extensional equivalence with act-consequentialism if the rules are

separable.[137] Crucially, though, in contemporary war, we should not casually assume uniformity of norms across cultures. We should be alert to cross-cultural differences in basic values, priorities, experiences, motivations, perceptions, and beliefs.[138]

In war, and perhaps especially in contemporary war, acting in the way that would lead to the best result if everyone else acted in that way may be especially risky where cultural differences in perceptions and values are important and perhaps not even fully understood. The other side may be unlikely to even roughly agree with our own factual and evaluative characterization of how we have acted.[139] And even if they do, they may still be deeply motivated to act otherwise.[140]

When we consider the case of intentionally killing large numbers of innocent civilians for some presumed great benefit, the moral complications are further multiplied. We can certainly see the costs of inflexible adherence to rigid rules in extreme circumstances. It has been said that "to refuse to break a generally beneficial rule in those cases in which it is not most beneficial to obey it seems irrational and to be a case of rule-worship."[141] Should we not be willing to pay some moral price to avoid the catastrophe of

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allowed to be infinitely specific.").

136. DAVID LYONS, FORMS AND LIMITS OF UTILITARIANISM 133-34 (1965) (arguing for the equivalence of act and rule utilitarianism).

137. For a looser sort of broader overlap, note that "a consequentialist can consistently believe that rights trump (other) utilities." David Sosa, *Consequences of Consequentialism*, 102 MIND 101, 103 (1993).

138. The cross-national and cross-cultural differences in war present heightened, indeed multiplied, versions of some of the already significant problems discussed by a distinguished Australian jurist and philosopher in D.H. HODGSON, CONSEQUENCES OF UTILITARIANISM: A STUDY IN NORMATIVE ETHICS AND LEGAL THEORY 50-62 (1967) (discussing the complications of attempting to apply act utilitarian principles in the broader context of a non-act utilitarian society). For an interesting, if statistically limited, view of some relevant cross-cultural differences in perceptions, see Brian Whitaker, *Muslim Countries Doubt Arab Role in September 11*, GUARDIAN, Feb. 28, 2002, at 17, 17, *available at* 2002 WL 14616986. *See also* Barbara Amiel, *Is the Muslim World Still in Denial About September 11?*, DAILY TELEGRAPH (London), Mar. 4, 2002, at 20, *available at* 2002 WL 15724758; Richard Morin & Claudia Deane, *Gallup, USA Today, CNN Polls Come Under Fire: Watchdog Group Issues Rebuke on Poll on Islamic Countries*, WASH. POST, Mar. 22, 2002, *available at* http://www.washingtonpost.com/ac2/wpdyn?pagename=article&node=&contentId=A27302002Mar22&notFound=true (critically discussing in particular the Gallup Poll of Islamic countries).

139. See the perceptual and valuational differences referred to *supra* note 138.

140. *See id.*

141. Smart, *supra* note 134, at 10.

the heavens actually falling?

We should of course be alert to the possibility of exceptional circumstances, and of proper exceptions to rules. But it has sensibly been replied: "[t]here are of course cases in which following a 'rule of thumb' will generate more disutility than breaking it. But necessarily, of course, there is no certain way of identifying such cases in advance."[142] At a very minimum, knowing when it is right to intentionally kill large numbers of civilians, in the context of contemporary war, will be especially difficult.

In the most general of contexts, Philip Fisher has observed that:

> If causality and Consequentialism, unexpected as well as easily anticipated consequences, remote as well as proximate changes in how the world now stands after an event, include consequences for second-, third- and tenth-order persons, and if this is a normal truth about action, then "and so on and on" is one of the most powerful phrases in our vocabulary.[143]

Can we even imagine someone like Alexander the Great, Julius Caesar, or Socrates actually making an important decision based on clearly understanding the particular long term good and bad consequences of their act?

We sometimes manage well enough to decide when to violate the general rule against, say, unconsented touching[144] in the case of an otherwise unattended choking victim,[145] despite all the unanticipated effects that may radiate from such a rescue. But it is just this sort of familiar decision that may tempt us into a less justified exceptionalism in dramatically different contexts, including modern warfare.

B. The Walzer Dilemma

For the theorist Michael Walzer, the possibility of wartime exceptionalism arises in this way: "Given the view of Nazism that I am assuming, the issue takes this form: should I wager this determinate crime (the killing of innocent people) against that immeasurable evil (a Nazi triumph)?"[146] Walzer would of course not

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142. Bernard Williams, *A Critique of Utilitarianism*, *in* UTILITARIANISM: FOR AND AGAINST, *supra* note 134, at 77, 126.

143. Philip Fisher, *Comment*, *in* JUDITH JARVIS THOMSON, GOODNESS AND ADVICE 85, 93 (Amy Gutmann ed., 2001).

144. *See, e.g.*, Michigan v. Reeves, 580 N.W.2d 433, 435 n.4 (Mich. 1998).

145. *See, e.g.*, Jim Travisano, *Breathtaking Rescue Missions*, CURRENT HEALTH, Jan. 1998, at 20, 20.

146. MICHAEL WALZER, JUST AND UNJUST WARS 259 (1977); *see also* Michael Walzer, *World War II: Why Was This War Different?*, 1 PHIL. & PUB. AFF. 3, 19 (1971) [hereinafter Walzer, *World War II*].

permit the killing of innocent civilians if some other course would avoid the immeasurable evil of a Nazi triumph,[147] or even if some other course offered "even a reasonable chance"[148] of avoiding that outcome. He appreciates the unavailability of certainty in matters of wartime prediction and of full understanding of current wartime circumstances.[149] But one can, and presumably must, seek out the best current understanding and advice possible.[150] Walzer then concludes that, if "my perception of evil [is] not hysterical or self-serving, then surely I must wager. There is no option; the risk otherwise is too great."[151]

Under these rare and tragic circumstances, "I dare to say that there will be no future or no foreseeable future for civilization and its rules unless I accept the burdens of criminality."[152] We may refer to this as the "threatened evil," the moral catastrophe, or the "supreme emergency" argument.

If we are inescapably faced, in practice or in theory, with this dilemma, we must indeed at some point put an end to the comfort of tentativeness and vacillation, and make the most responsible choice we can. But we must first work through the conceptual issues, and the circumstantial and evaluative elements of the problem, as carefully as we can.

It is difficult to know how literally Walzer's language is intended. For the dilemma to arise, must the threatened evil be "immeasurable"[153] in a strict sense? Or must the threatened evil seem merely great enough, comparatively, to somehow override or outweigh the evil of intentionally killing civilians as a likely

147. *See* Walzer, *World War II*, *supra* note 146, at 19.

148. *Id.*

149. *See id.*

150. *See id.*

151. *Id.*

152. *Id.* We shall make no attempt here to determine whether preserving civilization and its rules is, for Walzer, authorized if not required by a higher order moral rule, or else to be pursued as an overridingly good or valuable state of affairs. Probably, any attempt to insist on a sharp distinction between a deontological and a consequentialist approach under Walzer's assumed circumstances is somewhat artificial. *But cf.* IMMANUEL KANT, LECTURES ON ETHICS 149 (Benjamin Nelson ed., Louis Infield trans., Harper & Row 1963) (1930). Kant's vaguely comparable discussion of suicide reads:

> But in taking his life he does not preserve his person; he disposes of his person and not of its attendant circumstances; he robs himself of his person. This is contrary to the highest duty we have towards ourselves, for it annuls the condition of all other duties; it goes beyond the limits of the use of free will, for this use is possible only through the existence of the Subject.

Id.

153. *See supra* note 147 and accompanying text.

necessary and effective means of avoiding the threatened evil? We must ask this question for a morally important reason. If the threatened evil is really somehow immeasurably or incomparably great, and not just a grave evil, then Walzer's position is actually too restrained. Why, under such circumstances, should we choose an alternative strategy, not involving intended civilian casualties, that apparently offers a lesser if still "reasonable chance"[154] of averting the threatened immeasurable or incomparable evil? In a loosely Pascalian[155] sense, reducing the chances of a truly incomparable evil by any meaningful amount seems worth any morally limited price.[156] If a threatened outcome is really incomparably bad, does not a likely less effective response seem an irresponsible choice?

Walzer may, of course, not mean that a Nazi triumph would have been in this very strict sense an incomparable evil. But we must then turn to the world of practical, realistic complications. Are there any upper limits on the morally permissible number of intended civilian deaths, as long as all such deaths are thought reasonably necessary to avoid the threatened catastrophic evil? Suppose that the Nazi regime could at some point have been neutralized by a few civilian assassinations.[157] Let us set such a scenario as the least disturbing Walzer-type case. But now let us assume instead that avoiding the Nazi triumph will require the

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154. *See supra* note 148 and accompanying text.

155. *See generally* BLAISE PASCAL, PENSÉES (A.J. Krailsheimer trans., Penguin Books 1995) (1670).

156. This is, of course, not to suggest that the moral or other logic of Pascal's wager on the existence of God, given the apparent stakes, is uncontroversially sound. *See, e.g.*, Gregory Mougin & Elliott Sober, *Betting Against Pascal's Wager*, 28 NOÛS 382, 383-88 (1994) (rejecting most, but not all, traditional objections and devising others); Larimore Reid Nicholl, *Pascal's Wager: The Bet is Off*, 39 PHIL. & PHENOMENOLOGICAL RES. 274, 274 (1978) (rejecting Pascal's logic); Merle B. Turner, *Deciding for God—The Bayesian Support of Pascal's Wager*, 29 PHIL. & PHENOMENOLOGICAL RES. 84, 84 (1968). Pascal's wager seems to focus more on the ethics and prudence of belief and faith, problems not similarly presented by Walzer's dilemma.

157. For background, see Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MD. J. INT'L L. & TRADE 287, 312 (1998). *See generally* Louis R. Beres, *The Permissibility of State-Sponsored Assassination During Peace and War*, 5 TEMP. INT'L & COMP. L.J. 231 (1991) (addressing the question of whether assassination is an appropriate form of self-defense); Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609 (1992) (questioning when assassination can be distinguished from lawful combat); Jami Melissa Jackson, Comment, *The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications*, 24 N.C. J. INT'L L. & COM. REG. 669 (1999) (determining that the assassination of terrorist leaders is permissible under current national law).

intentional destruction of a number of large German or foreign population centers. This would involve not merely the destruction of cities, but their entire living populations. Would increasing, perhaps enormously, the number of intended but assumedly necessary civilian deaths at any point qualitatively change the moral issue?[158]

The complications can be multiplied almost indefinitely. How might the difference between combatants and noncombatants change in the context of intentional killings to avoid catastrophe? Which would be morally worse: to intentionally kill some crucial voluntary, knowing, noncombatant supporters of Hitler, or to unintentionally but quite predictably kill far greater numbers of ordinary noncombatants for some proportionate military advantage, bearing in mind the likely illegality of the first course[159] and the likely legality of the second?[160] Have we thought through the combatant/noncombatant distinction in this context as thoroughly as possible?

We must then think of all of the degrees of certainty that can properly be required. Walzer's standard regarding the moral character of the evil threatened, and perhaps even its likelihood of occurring, requires what he refers to as a non-hysterical and non-self-serving judgment.[161] Depending upon how this standard is interpreted, though, it may be either too easily met or too difficult to meet. Few responsible groups, and no irresponsible groups, will at the time officially recognize their own hysteria or self-servingness. Yet hysteria, officially recognized only after the fact, is not unknown in recent democratic history.[162] If a moral catastrophe, perhaps even

158. For the most wide-ranging and widely-cited discussion of how changes in the numbers of persons involved may or may not require qualitative shifts in moral judgments, see DEREK PARFIT, REASONS AND PERSONS (reprinted ed. 1986). For a discussion thereof, see READING PARFIT (Jonathan Dancy ed., 1997). For some paradoxes and complications arising at least from rigidly quantitative, narrowly incrementalist, or consciously manipulative reasoning in some Walzer-type cases, see Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893, 894-912 (2000) (citing, inter alia, MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 669, 719-24 (1997); Anthony Ellis, *Deontology, Incommensurability and the Arbitrary*, 52 PHIL. & PHENOMENOLOGICAL RES. 855, 859-63 (1992)).

159. *See supra* notes 39, 97-101 and accompanying text; *see also* Robert K. Fullinwider, *War and Innocence*, 5 PHIL. & PUB. AFF. 90, 94 (1975) ("To intentionally kill noncombatants is to kill beyond the scope of self-defense.").

160. *See supra* notes 37-39, 159 and accompanying text.

161. *See supra* text accompanying note 151.

162. *See, e.g.*, Blasi, *Pathological Perspective*, *supra* note 95, at 451 & n.2. For further background in the historical free speech precedents, see also *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50-56 (1961). More broadly, one

the abolition of recognizable civilization, genuinely looms, will hysteria be readily avoidable or, for that matter, terribly far from a justified reaction? Disentangling self-serving from properly self-interested and public spirited or altruistic motives is, as well, difficult even under much less demanding circumstances.[163]

We should think also of the crucial dimension of time. The passage of time is inseparably linked to the very nature and gravity of the threatened evil. Expanding military empires become overextended as much in time as in geography.[164] What are the logistics of Nazis effectively controlling the culture, thought processes, and deeply held values of five continents simultaneously, and sufficiently long enough for the lamp of liberal civilization to be more or less permanently extinguished? There is an important difference between being driven underground and being extinguished. Can we say that the combined economic potential of the Axis powers, by comparison not only with that of the Allies, but with the sheer magnitude of the task, could have more or less permanently extinguished civilized democratic values?[165] Was Stalinism within the U.S.S.R. able to approach anywhere remotely close to eradicating disfavored thinking? If we do no more than think of the basic economic productivity numbers for the relevant period, it seems clear that time could not have been on the side of a Nazi military victory of any description.[166]

It is, in a sense, perhaps not really crucial to Walzer's supreme emergency argument that there was not even a single moment in which ultimate defeat of the Nazis actually required intentional civilian casualties. Walzer's main interest may be either historical or theoretical. Walzer may want merely to hold open the door for such a policy, in some future horrifying circumstance.

But the Nazi case is certainly still relevant to the hypothetical

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might well ask "who is there who does not think his cause just?" ERASMUS, THE EDUCATION OF A CHRISTIAN PRINCE 104 (Lisa Jardine ed. & trans., Cambridge Univ. Press 1997) (1516).

163. For background on some of the inescapable complications, see THOMAS NAGEL, THE POSSIBILITY OF ALTRUISM 79-142 (1970).

164. A reading of the (admittedly abridged version of the) classic EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE (David Womersley ed., abr. ed. 2000), suggests that the limits to Roman rule were set as much by the need to control across time and changing circumstances as by the need to control simultaneously large geographical territories.

165. *See, e.g.*, THE OXFORD COMPANION TO WORLD WAR II 921-23 (I.C.B. Dear ed., 2001) (D'Ann Campbell & Richard Jensen contributors); *id.* at 1005 ("Though the mere possession of material resources is not a full explanation of Allied victory, it goes a long way towards explaining Axis defeat.") (Richard Overy, contributor).

166. *See id.* at 1004-05.

supreme emergency case. If we can sensibly doubt that there was ever a moment when intentional killing of civilians—as distinct even from massive numbers of unintended but predicted civilian deaths—was really necessary to the survival of modern liberal values, this may hearten us in prohibiting intentional killings of civilians without exception.

We should also bear in mind that for the foreseeable future, and perhaps even despite the role of computer technology, the bearers of the Enlightenment legacy will likely be both cuturally diversified, "decentralized," and economically far more powerful than those who reject such values.[167] It is difficult to imagine a plausible scenario in which the economically dominant, variously diversified forces of modern liberalism must, in battling those who reject such values, adopt a policy of intentionally killing civilians. Less drastic—even if only less drastically criminal—means of preventing the actual extinction of broadly liberal values would seem to be available.

We can perhaps imagine a case in which our intentional killing of noncombatants might seem necessary to avert a large number of noncombatant casualties caused by terrorist acts against the democracies. This is at least conceivable. But a future large scale terrorist attack against the civilian residents of a major Western city, as horrifying as it would obviously be, comes nowhere near Walzer's supreme emergency or civilizational extinction standard.[168]

It is thus not difficult to build a case against any actual need for Walzer's supreme emergency principle. And we could do so without at any point invoking a principle that deontologically[169] bars as

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167. This is, of course, one of the disconcerting asymmetries of much warfare in the post Cold-War era. *See* sources cited *infra* note 171.

168. *See* Walzer, *World War II*, *supra* note 146, at 18-19.

169. *See supra* notes 120-21 and accompanying text. Ordinarily, a deontologist could say that it is wrong to lie, even if one lie would prevent many more lies from being told, or would prevent some nearly catastrophic moral horror. Or a deontologist might condemn a murder, even if the murder would prevent many other murders, or a nearly catastrophic moral horror. Of course, a deontologist might choose not to condemn some or all lies or murders. And at least a broad rule consequentialist might condemn them all.

But what could a deontologist say, in parallel fashion, in the case of the assumed extinction of moral civilization itself? Walzer proposes to trade intentional civilian casualties for the assumed avoidance of what he takes to be utter catastrophe. How, precisely, could a deontologist reject Walzer's position in parallel with the above responses in the cases of lying and murder?

Would a deontologist say, in parallel, that we should not intentionally kill many civilians in order to save moral civilization, even if in doing so we could prevent many more civilians from being intentionally killed? Or even if in doing so, we could prevent some nearly catastrophic horror? Or even if we could save moral civilization thereby on many separate occasions?

intrinsically evil the act of intentionally killing civilians. But it is important to see the supreme emergency principle as not only incomplete, logically questionable, and unnecessary, but as affirmatively dangerous as well.

Walzer himself says that "[m]ost wars are described in ultimate terms while they are being fought."[170] This may, in the context of recent NATO and other allied coalition actions, now be something of an exaggeration. But almost by definition, this claim is more likely to be true of desperate or fanatical groups[171] and states who see themselves, rightly or not, as culturally jeopardized and as long oppressed by the well-off democracies. The stakes will tend to seem higher for fanatical groups or nations that rightly or wrongly see themselves as oppressed than for others.[172] And it will tend to be just such groups that will see their inflicting intentional civilian casualties as necessary for their very cultural survival, or in their direct diplomatic or negotiating interest. From desperation, we may expect what we perceive to be extremism.

If a group is willing to intentionally inflict civilian casualties, or to redefine ordinary civilians as combatants, the group admittedly

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The point here is not that the deontologist's response is unconvincing, but that it seems somehow oddly disproportioned and unresponsive to the circumstances Walzer assumes. For a discussion of the deontologist's insistence on conformance to proper norms, and not to something like overall minimization of all violations of those norms, see Hurd, *What In the World*, *supra* note 119, at 161-62.

It is thus difficult for a deontologist to show that Walzer is merely minimizing the total number of violations of some basic rule, as distinct from complying with the rule on some given occasion. Walzer's supreme emergency policy and the assumed moral consequences, in a broad sense, of following that policy in appropriate circumstances are generally difficult to characterize. And it is difficult to see in particular why a deontologist who opposes Walzer's supreme emergency principle should be eager to insist that the principle not be adopted, if the principle does all and only what Walzer claims for it, including the salvation of moral civilization itself.

170. Walzer, *World War II*, *supra* note 146, at 3; *see also* Richard B. Miller, Book Review, 14 J.L. & RELIGION 1013, 1016-17 (2001) (reviewing WALZER, *supra* note 146, and stating that "[a]llowing for 'utilitarianism in extremity' may easily erode the principle of noncombatant immunity, given that defeat in war is often viewed by its victims as 'unusual and horrifying'").

171. *See, e.g.*, M. Cherif Bassiouni, *Assessing "Terrorism" into the New Millennium*, 12 DEPAUL BUS. L.J. 1, 16 (1999/2000); *cf.* Benjamin R. Barber, *Beyond Jihad vs. McWorld: On Terrorism and the New Democratic Realism*, NATION, Jan. 21, 2002, at 11, 11 (discussing the range of motivations and perceived stakes for those engaging in Jihad); Richard Falk, *In Defense of 'Just War' Thinking*, NATION, Dec. 24, 2001, at 23, 23 (distinguishing in this context between the Al Qaeda group and the nation-state of Iraq).

172. *See* Barber, *supra* note 171, at 17.

may not be inclined to wait for international law to recognize a supreme emergency exception.[173] Such a group may regard some or all of the law of war as biased against the oppressed, or may view such law as of limited concern, given the threat to its cultural survival. At the margin, though, there may also be groups that would be willing to intentionally attack civilians only with the arguable sanction of a generalized Walzer-type[174] supreme emergency exception. Everyone else, however, may be better off with an exceptionless rule, rather than with an occasion for likely inconclusive cross-cultural debate over the applicability of Walzer's well-intended exception. And it seems unlikely that a non-liberal society that felt its survival to be threatened would acquiesce in a literal Walzer-type exception that privileged the survival of liberal democracy only, but no other form of society.

It is possible to argue, again in a loosely Pascalian kind of way,[175] that a Walzer-type supreme emergency exception, whether confined to liberal society or not, should be incorporated into the law, if this would meaningfully reduce the chances of the extinction of modern liberal values, even if it is actually far more likely that such an exception will be somehow misused and result instead in

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173. *See* JOHNSON, *supra* note 122, at 28.

174. Other distinguished writers have been understandably sympathetic to Walzer's supreme emergency doctrine, or something like it. *See* John Rawls, *Fifty Years After Hiroshima*, *in* JOHN RAWLS, COLLECTED PAPERS 565, 565-72 (Samuel Freeman ed., 1999). Rawls indicates that civilians "can never be attacked directly except in times of extreme crisis." *Id.* at 567. Rawls closely follows Walzer's moral and legal analysis of World War II. *Id.* at 568-69. Rawls concludes that:

> [T]he crucial matter is that under no conditions could Germany be allowed to win the war, and this for two basic reasons: first, the nature and history of constitutional democracy and its place in European culture; and second, the peculiar evil of Nazism and the enormous and uncalculable moral and political evil it represented for civilized society.

Id. Rawls's discussion appears to raise issues similar to those evoked by Walzer. For a discussion of Rawls's views, see Darrell Cole, *Death Before Dishonor or Dishonor Before Death? Christian Just War, Terrorism, and Supreme Emergency*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 81, 90-91 (2002). A certain ambivalence in extreme cases is also reflected in the work of the philosopher Thomas Nagel. Nagel observes descriptively that "[t]he policy of attacking the civilian population . . . seems to be accepted still, at least if the stakes are high enough. It gives evidence of a moral conviction that the deliberate killing of noncombatants—women, children, old people—is permissible if enough can be gained by it." Thomas Nagel, *War and Massacre*, 1 PHIL. & PUB. AFF. 123, 127 (1972). For interpretation of Nagel's position, see R.B. Brandt, *Utilitarianism and the Rules of War*, 1 PHIL & PUB. AFF. 145, 146-48 (1972).

175. *See supra* notes 155-56 and accompanying text.

some increased number of intentional civilian killings. The idea would be that it is worth paying a substantial moral price in order to meaningfully reduce the chances of the extinction of liberal values through war. At this point, we must simply doubt the realism of this argument's major premise. It is difficult to say which is more extremely unlikely: that modern broadly liberal values will genuinely face something like permanent extinction specifically through war, or that in such a context, only the intentional killing of civilians, and no other legal or illegal[176] course, would likely save those values.

In any event, this highly unlikely scenario seems hardly more likely than one in which Walzer's own supreme emergency exception itself indirectly encourages attacks on civilians sufficiently horrific to damage or even jeopardize basic liberal values. We are perhaps best advised to assume that these two extremely speculative scenarios are of roughly offsetting likelihood, and to leave the burden of proof with those who would permit the intentional killing of civilians, along with the more likely misuse of an intentional killing exception.[177]

More broadly, though, can we make further progress on assessing Walzer's supreme emergency doctrine by more careful moral philosophizing? We again have at our disposal not only the categories of consequentialism[178] and deontology,[179] but the multiple varieties thereof.[180] Walzer's supreme emergency doctrine has been characterized as "either a form of consequentialism, not unlike rule-utilitarianism, or . . . a form of moral paradox."[181] But the supreme emergency doctrine really cannot claim the unique advantages or disadvantages of either consequentialism or deontology, as it is easily enough reformulated in terms of either approach. Something quite parallel holds, as well, for the critiques of Walzer's doctrine.

Walzer is, in this regard, indeed often thought of as something

176. It might be, presumably, that the civilization could be saved by illegal, but less gravely illegal, means.

177. For further discussion of Walzer's supreme emergency doctrine, see BRIAN OREND, MICHAEL WALZER ON WAR AND JUSTICE 127-33 (2000) [hereinafter OREND, MICHAEL WALZER ON WAR AND JUSTICE]; Stanley Hoffman, *States and the Morality of War*, 9 POL. THEORY 149, 166-67 (1981); Brian Orend, *Just and Lawful Conduct in War: Reflections on Michael Walzer*, 20 L. & PHIL. 1, 21-29 (2001).

178. *See supra* notes 118-19 and accompanying text.

179. *See supra* notes 120-21 and accompanying text.

180. *See supra* notes 124-34 and accompanying text.

181. OREND, MICHAEL WALZER ON WAR AND JUSTICE, *supra* note 177, at 133. For a vaguely similar characterization of Walzer's position, see JOHN FINNIS ET AL., NUCLEAR DETERRENCE, MORALITY AND REALISM 201 (1987).

of a rule consequentialist,[182] in the sense that a decision-maker is not to just uninhibitedly optimize the consequences in supreme emergency circumstances, but to follow a relatively narrow rule[183] applicable in just those narrow emergency circumstances. Walzer need not endorse the abandonment of all rules when the consequences of following typical rules become catastrophic.[184] Walzer can endorse following one narrow rule for supreme emergencies when other, more familiar rules have exhausted their proper scope.[185]

Walzer might, in the alternative, defend his supreme emergency principle by reference to the nature and character of the act,[186] under exceptional circumstances, of attacking innocent civilians in order to save civilization. The nature and character of the act could include some reference to its context and purposes. Walzer's defense could in this way be deontological. The idea would be that the nature and character of the act would involve nothing less than upholding modern ethics, or the modern ethical arena itself, at doubtless unfortunate moral cost.[187] One could certainly say that preserving scope for the very possibility of modern moral choice is itself a choice or an intention, and not a mere consequence, as consequentialists would use the term.

Of course, similar ambiguity between consequentialism and deontology could characterize the approach taken by Walzer's critics. We have already noticed above the possibility of characterizing our critique of Walzer in consequentialist terms.[188] Walzer's supreme emergency doctrine, we argued, would quite likely be of minimal positive consequence, and would likely lead to generally bad consequences.[189] But it is certainly possible to shift

182. *See* OREND, MICHAEL WALZER ON WAR AND JUSTICE, *supra* note 177, at 132-33.

183. *See supra* note 123 and accompanying text.

184. And thus we need not follow Walzer in his own characterization of his position as a "utilitarianism of extremity." See OREND, MICHAEL WALZER ON WAR AND JUSTICE, *supra* note 177, at 132, for discussion.

185. Walzer's supreme emergency rule seems sufficiently general, in principle, to count as a rule, as opposed to a mere prescription of how to act under only a single set of circumstances. These categories are capable of merging at their extremes. *See supra* note 135. But for a characterization of the supreme emergency rule as indeed a possible rule, see Brandt, *supra* note 174, at 147 n.3.

186. *See supra* notes 120-21 and accompanying text.

187. This is certainly not to deny a certain lack of clarity of the distinction between consequentialist and deontological approaches, or the existence of some overlap. *See supra* notes 146-52, 173-76 and accompanying text.

188. *See supra* text accompanying note 168.

189. *See supra* text accompanying notes 146-76.

the terms of a critical approach to Walzer's argument. On such a view, Walzer's principle conflicts with the deepest relevant and valid moral rules, and the nature and character of the rule Walzer recommends amounts to unjustified and unexcused intentional killing of the innocent.[190] This would be the beginning of the deontological argument against Walzer's principle—one that would ultimately be inseparable from, or a recharacterization of, the consequentialist version of the argument against Walzer's principle.

We are left, despite these shifts in philosophical approach, with the substance of the arguments already deployed for and against Walzer's position. Walzer's position does not seem sound, but the choice between consequentialism and deontology does not seem relevant either way. We are left with the conclusion, whether one accepts or rejects Walzer's position, that progress is more likely through sound practical judgment[191] on the part of thinkers and legal actors than through more sophisticated manipulation of legal and philosophical categories. An ounce of practical wisdom may be worth a pound of conceptual or doctrinal machinations.

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190. For the basic elements of such an approach, as deployed in the specific context of John Rawls's parallel discussion, see generally Cole, *supra* note 174.

191. For an extended discussion of the important role of the Greek concept of phronesis, or what we would call practical judgment, see ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 109-62 (1993). The underappreciated virtue of practical judgment points further to the underemphasized importance of instilling and promoting universally appropriate political virtues. *See also* Robert C. Roberts, *Virtues and Rules*, 51 PHIL. & PHENOMENOLOGICAL RES. 325, 329 (1991) (explaining that virtues are not just dispositions to action, "[t]hey are determinations of our emotions, passions, desires, and concerns. They are patterns of saliency, attention, perception, and judgment. Some of them are self-management skills (courage, patience, self-control)."). Matters such as the judgment, courage, patience, and self-control exercised by intentional actors seem subject to at least some minimal collective steering. This steering may be undertaken by means such as increasing the progressive content of the international law. And such steering seems possible and important in the cases of unintended or perhaps unnecessary or disproportionate civilian casualties, and of the intentional killing of civilians.

For an interesting contrast between emphasis on virtue and on pragmatic effectiveness, compare CARL VON CLAUSEWITZ, 1 ON WAR 103 (Anatol Rapoport ed., Penguin Books 1968) (1832) ("[I]f we find civilized nations do not . . . devastate towns and countries, this is because their intelligence . . . has taught them more effectual means of applying force than these rude acts of mere instinct."), with the samurai tradition reflected in THOMAS CLEARY, CODE OF THE SAMURAI 35 (1999) ("To abuse someone he sees cannot fight back is something a valiant warrior simply does not do.").

VII. CONCLUSION

We have seen that Walzer's supreme emergency principle regarding intentional killing of civilians should not be adopted, and that the methodological choice between consequentialism and deontology in this kind of case does not seem to matter. Can we make progress, though, on the earlier problem of how to treat unintended civilian injury cases by reconsidering the distinction between consequentialist and deontological approaches to such cases? Again, a consequentialist approach will emphasize the good and bad consequences flowing from the given act.[192] Equally roughly, a deontological approach to incidental casualties will focus on the nature and character of the act itself, more or less apart from its consequences.[193]

One general possibility would be to try to short-circuit the debate by ruling out deontology as itself a confused notion. Can we really separate the nature and character of an act from all its possible consequences? And even if we could do so, why should we then much care about the act apart from all of its possible consequences? Does not the nature of an act eventually somehow translate, at least indirectly, into consequences? Suppose we say, for example, that telling a lie has a moral quality independent of its consequences.[194] This may seem plausible, especially when we realize that a lie might be instantly disbelieved and not acted upon. A lie thus might seem objectionable even if no one relies on it.

But every lie, even an unsuccessful lie, tends to have at least minimal polluting consequences once introduced into the stream of discourse. Any lie may raise the possibility that listeners should invest more effort in screening and filtering possible lies. Every lie thus puts some minimal additional stress on our system of communicative discourse. These effects seem to be morally relevant consequences of even unsuccessful lies. Perhaps even the effects of lying on the liar's own character could be viewed as morally relevant consequences of lying. One's character presumably has consequences. What we care about thus seems to come down, directly or indirectly, to consequences.

In the case of foreseen but unintended killings, as distinct from the case of lying, it is difficult to imagine that we can clearly

192. *See supra* notes 118-19 and accompanying text.

193. *See supra* notes 120-21 and accompanying text.

194. It is certainly possible to interpret Kant's discussion of lying as non-consequentialist. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 89-90, 100-04 (H.J. Paton trans., Harper & Row 1964) (1785). For an interesting consequentialist approach to Kant's moral theory, see generally David Cummiskey, *Kantian Consequentialism*, 100 ETHICS 586 (1990).

separate the nature of the act from the act's possible consequences. It is even more difficult to believe that the consequences of the act—including a number of innocent civilian deaths—are not of crucial importance in morally judging the act. It is just barely possible for someone to argue that the deaths of the innocent civilians are really not consequences of the act, but instead are a part of the very nature of the act itself. This would have the advantage for the deontologist of bringing obviously morally relevant considerations—the foreseen deaths—into the nature of the act itself. But it would only further confuse what is to count as part of the act itself, and what is to count as a consequence of the act.

Ultimately, though, we cannot hope to show that there is no possible way of conceiving of the distinction between act and consequence that makes sense, and that focuses at least some moral attention on the act itself. There may thus be some way of developing a consistent and plausible deontology. We need not, for our purposes, claim otherwise. We certainly need not claim that deontological approaches to unintended civilian casualties cannot possibly work.

All this is complicated in the broader legal context by the fact that there can be strict liability crimes, in which the actor's degree of care may have been impeccable, but the actor is still held liable.[195] We might say in such a case, as a deontologist might, that the actor is held strictly liable for the nature of the carefully undertaken but injurious act itself. Or we might alternatively choose to say, with the consequentialist, that the actor is being held strictly liable, without regard to his precautions, for the harmful consequences of his acts.

It is probably more natural in the cases of unintended civilian casualties to say that the actor may be held liable for the unintended casualties precisely as consequences of the act. There seems no real harm in these cases in focusing on the consequences of an act, apart from the nature of the act itself. Even here, though, we should not overplay the role of consequences in the moral and legal analysis. Some sort of intended overt military act is still required, and it is possible that not all consequences of the overt act are equally morally relevant. Consequences of a military decision may radiate out over time and space, such that some consequences may be deemed too remote, or simply not the proximate result of the

195. A strict liability crime has been defined as "[a] crime that does not require a *mens rea* element . . . ." BLACK'S LAW DICTIONARY 378 (7th ed. 1999); *see, e.g.*, Wisconsin v. Coleman, 556 N.W.2d 701, 703-04 (Wis. 1996) (felon in possession of a firearm).

military action at issue.[196]

The categories of the consequentialists and the deontologists thus cannot be conclusively refined in such a way as to further improve the law of war in the context of either intended or unintended civilian casualties. But can we nevertheless do better than the current law in other respects?

The law to which we publicly commit ourselves may differ from our possibly secret reserved and unspoken intentions. Perhaps, in Walzer's supreme emergency case,[197] the best outcome actually requires some duplicity. Perhaps the best policy, ideally, might be to adhere publicly to an absolute prohibition on intentional killings of civilians, and to expect and insist that others follow such a policy, while silently reserving for modern broadly liberal states like the United States[198] the possibility of inflicting such casualties if we ever believe ourselves to be in Walzer's circumstances of supreme emergency.

Some might see this "dual track," or baldly hypocritical, approach as offering the "best of both worlds." Enemies and presumed fanatics are to be held bound by the absolute prohibition, lest they inflict massive civilian casualties in an attempt to preserve largely repressive cultural values with which we may have, at best, only quite modest sympathy. But we would at the same time have no real intention of permitting the anticipated destruction of modern civilized values. Both a morally objectivist and a morally relativist culture can, quite consistently, rank the preservation of its own values higher than the preservation of noncombatant lives.[199]

But this "best of both worlds" defection from an absolute prohibition of intentional killings would, unfortunately, likely tend mainly to increase the risk of outcomes we would think of as remarkably undesirable. The "dual track" approach would more likely increase the risk of plainly bad outcomes than meaningfully diminish the risk of the worst imaginable outcomes. The crucial problem is that the possibility of publicly agreeing to the absolute prohibition of intentional civilian killings, while privately reserving the option of future non-compliance, is universally obvious. This possibility of hypocrisy will thus be obvious to all of one's potential antagonists. Any party can examine the military capabilities, deployments, military culture, academic culture, popular culture,

196. *See, e.g.*, Doe v. Boys Club of Greater Dallas, Inc., 907 S.W.2d 472, 477 (Tex. 1995) (discussing proximate cause in a negligence cause of action).

197. *See supra* Part VI.B.

198. The price of strategic defection in other contexts is explored in ROBERT AXELROD, THE EVOLUTION OF COOPERATION 68-69, 176-77 (1984).

199. *See supra* Part IV.

journalism, history, and publicly expressed mood of any other party. A formal commitment of a party to the absolute prohibition against intentional killings of civilians may seem, in that context, either more or less credible.

Even a "secret" policy is thus likely to have and to require some sufficient supporting cultural manifestation, at least in a society as open as our own. In our open society, distinguished commentators would offer moral support for the tacit reservation in question.[200] At some point, it could eventually become rational for other international parties to conclude that our formal adherence to the absolute prohibition cannot practically be counted upon, and is merely strategic or manipulative, rather than sincere.[201]

This is not to suggest that a fanatical party that rightly or wrongly sees its way of life as threatened, and salvageable only by massive intentional killings of civilians, is likely to be crucially influenced by our own assumed hypocrisy on the legal rule in question. But it is also certainly possible that a presumed fanatical group might feel less inhibited about committing a broad range of possible international legal crimes if it senses that the broad liberal commitment against intentional killing of civilians is unworthy of trust.

In contrast, any consideration that suggests to presumed fanatical groups that their target states really have not even tacitly legitimized the massive killing of civilians should tend to reduce the payoff from, and thus the probability of, attacks on civilians by fanatical groups. Our consistent and credible repudiating of any possibility of such an attack is thus still well advised. Such a repudiation would, of course, preclude us from attempting to save modern liberal civilization in exactly the manner Walzer recommends. But as we have seen above,[202] foreswearing Walzer's supreme emergency option is largely a matter of foreswearing merely a series of compounded illusions.

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200. *See supra* note 174 and Part VI.B.

201. For a brief discussion in another context of some indirect costs of strategic defection, see Peter Huber, *Competition, Conglomerates, and the Evolution of Cooperation*, 93 YALE L.J. 1147, 1154-55 (1984) (reviewing AXELROD, *supra* note 198).

202. *See supra* Part VI.B.